Supreme Court, U.S.
FILED
OCT 13 1992
OFFICE OF THE CLERK

No. 92-436

In The

Supreme Court of the United States

October Term, 1992

VINCENT JAMES LANDANO,

Petitioner,

vs.

JOHN J. RAFFERTY, SUPERINTENDENT, RAHWAY STATE PRISON, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

EDWARD J. DEFAZIO
Counsel of Record
Attorney for Respondents
Office of Hudson County Prosecutor
595 Newark Avenue
Jersey City, New Jersey 07306
(201) 795-6400

2780
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
Counterstatement of the Case	1
Summary of Argument	2
Reasons for Denying the Writ	2
I. Did the district court abuse its discretion in granting bail to a state prisoner pending exhaustion of state remedies by finding that probable innocence was an extraordinary circumstance justifying said action.	2
Conclusion	6

TABLE OF CITATIONS

Cases Cited:

Boyd v. City of Orlando, 402 F.2d 966 (5th Cir. 1968)	4
Bronson v. California, 328 F.2d 159 (9th Cir. 1964) cert. denied, 380 U.S. 951	4
Calley v. Callaway, 496 F.2d 701 (5th Cir. 1974)	3
Herrera v. Collins, ____ U.S. ____, 112 S. Ct. 1074 (1992)	4
Jones v. Cunningham, 371 U.S. 236	4

Contents

Page

Kuhlmann v. Wilson, 477 U.S. 436 4

Landano v. Rafferty, 782 F. Supp. 986 (D.N.J. 1992) 5

Landano v. Rafferty, No. 91-1881 (D.N.J. May 6, 1991) 5

Levy v. Parker, 396 U.S. 1204, aff'd, 396 U.S. 804 (1969) 3

Lucas v. Hadden, 799 F.2d 365 (3rd Cir. 1986) 2, 3

Noyd v. Boyd, 395 U.S. 683 (1965) 3

Sawyer v. Whitley, ____ U.S. ____, 112 S. Ct. 2514 (1992) 4, 5, 6

APPENDIX

Appendix A — Letter Opinion and Order of the Superior Court of New Jersey Dated July 17, 1992 ..... 1a

No. 92-436

In The

Supreme Court of the United States

October Term, 1992

VINCENT JAMES LANDANO,

Petitioner,

vs.

JOHN J. RAFFERTY, SUPERINTENDENT, RAHWAY STATE PRISON, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

The respondent did not seek to prevent the exercise of federal jurisdiction over the new habeas corpus petition by filing a motion before the state court as alleged by the petitioner. The respondent's sole purpose was to seek clarification of the state court's opinion of March 4, 1991 denying the evidentiary hearing. In fact, the

petitioner, upon receipt of said opinion and in order to avoid state appellate processes, immediately filed an order to show cause on the habeas petition in federal court.

On March 12, 1992, the New Jersey Appellate Division reversed the trial judge's denial of post-conviction relief and remanded for an evidentiary hearing.

On July 17, 1992, following a full evidentiary hearing, the trial judge denied all relief in a written opinion (*See* Opinion and Order, 1a).

SUMMARY OF ARGUMENT

Probable innocence is neither an extraordinary circumstance warranting the enlargement of the petitioner on federal bail nor sufficient as a matter of relevant case law, *Lucas v. Hadden, infra,* to warrant consideration of same.

REASONS FOR DENYING THE WRIT

I.

DID THE DISTRICT COURT ABUSE ITS DISCRETION IN GRANTING BAIL TO A STATE PRISONER PENDING EXHAUSTION OF STATE REMEDIES BY FINDING THAT PROBABLE INNOCENCE WAS AN EXTRAORDINARY CIRCUMSTANCE JUSTIFYING SAID ACTION.

Since there is not a statutory provision in New Jersey for bail pending the resolution of state post-conviction proceedings it is incumbent upon a federal court granting same to first establish the existence of extraordinary circumstances. This proposition was first articulated in *Lucas v. Hadden*, 799 F.2d 365 (3rd Cir. 1986),

wherein the Third Circuit set forth the standard for determining whether a state habeas petitioner who has not exhausted state remedies is entitled to bail. In adopting the "extraordinary circumstances" test, Judge Adams wrote:

> We doubt that it is appropriate to grant bail prior to ruling on a State habeas petition solely on the ground that there is a high likelihood of success on the merits, especially absent exhaustion of State remedies.

Id. at 367.

Finding no "extraordinary circumstances" to merit a preliminary grant of bail in *Lucas*, the court offered no bright line test for determining such circumstances. Rather, it suggested a case-by-case analysis.

Findings of "extraordinary circumstances" have rarely occurred and have usually involved situations such as the petitioner's extreme ill health or the imminent completion of a sentence of incarceration. In *Calley v. Callaway*, 496 F.2d 701 (5th Cir. 1974), the court of appeals reversed an order granting bail to a habeas petitioner finding no extraordinary or exceptional circumstances which would merit permitting the petitioner to remain enlarged on bail pending resolution of the petition. In its ruling, the *Calley* court recognized there might be circumstances, other than petitioner's poor health, which would merit the enlargement of a habeas petitioner on federal bail. Those circumstances include a petitioner who is close to completing a short sentence for a relatively minor offense, in that collateral review would be ineffective if such review occurred after the completion of the custodial sentence.[1]

---

1. *Noyd v. Boyd*, 395 U.S. 683 (1965); where all but two days of a one-year sentence served; *Levy v. Parker*, 396 U.S. 1204, *aff'd*, 396 U.S. 804 (1969) where all but

(Cont'd)

In *Sawyer v. Whitley*, ___U.S. ___, 112 S. Ct. 2514 (1992) this Court, in its review of a capital murder conviction was asked to determine.

> "... whether a petitioner bringing a successive, abusive, or defaulted federal habeas claim has shown he is "actually innocent" of the death penalty to which he has been sentenced so that the court may reach the merits of the claim."

Id. at 2517.

This Court's holding was couched in language that demands a far more substantial showing from certain habeas petitioners than had previously been thought necessary. *Compare*, *Kuhlmann v. Wilson*, 477 U.S. 436 at 455, N. 17. The language utilized by this Court is such as to warrant the belief that the direction in which this Court is proceeding in regard to habeas petitions will prove more rather than less restrictive. As such it is therefore reasonable to assert that *Herrera v. Collins*, ___ U.S. ___, 112 S. Ct. 1074 (1992) will continue in this vein thus compelling the overall conclusion that a finding of "probable innocence", as in this matter, will remain patently insufficient even after *Herrera* is decided.

Furthermore, it would be incorrect to automatically conclude that the parameters within which a finding of "actual innocence"

(Cont'd)

twelve days of a three year sentence served; *Boyd v. City of Orlando*, 402 F.2d 966 (5th Cir. 1968) which involved a one hundred twenty day sentence. But *see Bronson v. California*, 328 F.2d 159 (9th Cir. 1964) *cert. denied*, 380 U.S. 951 where defendant was ordered to serve 180 days as a condition of five years probation. Defendant argued he was entitled to bail since he would finish his incarceration quickly and thus his habeas corpus could become moot. However, since defendant would remain on probation, under *Jones v. Cunningham*, 371 U.S. 236, this probation sentence is enough of a control over defendant to avoid mootness. Thus, bail was properly denied.

can arise will be the same, either definitionally or factually, in a non capital case as in a capital case. The logic of this conclusion is found in the juxtaposing of the best case scenerio for a habeas petitioner in a capital case, that of a credible confession to the crime by another person, with the concluding sentence of that paragraph wherein it is stated that the concept of "actual innocence" is readily apparent in non-capital cases. *Sawyer v. Whitley, supra,* 112 S. Ct. at 2519.

Although the petitioner has convinced the district court of his probable innocence it is significant to note that the language utilized by the district judge is less then absolute in that regard. The district judge recently stated it had "already determined that petitioner *may be* (emphasis added) innocent of the charges for which he was convicted," *Landano v. Rafferty,* 782 F. Supp. 986, 992 (D.N.J. 1992) (*quoting Landano v. Rafferty,* No. 91-1881, slip opinion at 7 (D.N.J. May 6, 1991) (Supplemental Opinion and Order).

Thus the analysis which results in the conclusion of "probable innocence" is substantially less definitive in the language chosen to express same then an extension of the relevent cases defining "extradordinary circumstances" would seem to allow.

The Third Circuit, while focusing on the rationale utilized by the district court in granting bail to the petitioner pending his exhaustion of state remedies, discussed the issue of "probable innocence" and concluded that the cases which have examined this issue did so from the perspective of a federal court's right to" overlook a procedural default, not a failure to exhaust state remedies." (Pet. App. p. 27). The Third Circuit concluded its discussion of this point by stating, "When the State has not completed its review of the petitioner's claims, it is inappropriate for a federal court to reach the merits of petitioner's case in ruling on a motion for bail." (Pet. App. p. 27).

Furthermore, even if "probable innocence" was thought the relevent test, it is clear that the concept of "extraordinary circumstances", as defined by applicable case law, far outshines the opaque language chosen by the district court while summarizing its deeply felt beliefs regarding this case. When viewed in the light of the language of *Sawyer v. Whitley, supra,* this truism becomes even more apparent.

CONCLUSION

The petitioner's petition for a writ of certionari should be denied in its entirety as he has failed to establish a sufficent basis to warrant same being granted.

Respectfully submitted,

CARMEN MESSANO
Prosecutor of Hudson County
EDWARD J. DE FAZIO
First Assistant Prosecutor
Attorneys for Respondents

APPENDIX A - LETTER OPINION AND ORDER OF THE SUPERIOR COURT OF NEW JERSEY DATED JULY 17, 1992

SUPERIOR COURT OF NEW JERSEY

Maurice A. Walsh, Jr.
Judge

Hudson County Courthouse
Administration Building
Jersey City, NJ 07306

[seal]
Seal of the Superior Court of New Jersey

July 17, 1992

Smith, Mullin & Kiernan, P.C.
Counsellors at Law
200 Executive Drive, Suite 155
West Orange, New Jersey 07052-3377
Attn: Neil Mullin, Esq.

AND

Carmen Messano, Prosecutor
Hudson County Administration Bldg.
595 Newark Ave.
Jersey City, N.J. 07036
Attn: Donald Gardner, Asst. Pros.

Re: State vs. James Landano
Ind. No. 73-76

Letter Opinion
Post Conviction Relief Evidentiary Hearing

Dear Sirs:

On March 12, 1992, the Appellate Division, Superior Court of

Appendix A

New Jersey (A-4458-90TI) in its opinion ordered as follows:

> We therefore remand for a full evidentiary hearing on the "new" issues not previously subject to an evidentiary hearing in the State court and for further consideration of any previously considered ruling which may be impacted or affected by consideration of these "new issues." Specifically, the evidentiary hearing shall consider the claims stemming from documentation that two people including a witness at trial, Pascuiti, failed to identify a photograph of defendant (the "ID on Landano" issue) and a police continuation report that a witness or witnesses identified Forni as the driver of the getaway car ("the Basapas/ Pasapas Report" issue) and that this information was not submitted to defendant at or before trial. The hearing shall also consider any other claims or issues incidental thereto, including the impact, if any, of any lost or destroyed material. As noted, it could be that the prior post-conviction determinations concerning the Roller, Portas and Roth testimony may be seen in a different light based on development of the record concerning the "new issues." The taking of testimony on these questions, too, may become essential to an understanding of the entire investigation. We emphasize, however, that by ordering a full evidentiary hearing, we suggest no predisposition or inclination concerning the merits. Irrespective of disposition, however,

> the judge must "state separately [his] findings of fact and conclusions of law. *R. 3:22-11.*" 22-23.

In accordance with the above order, this court conducted a full evidentiary hearing on May 7, 8, 11 and 12, 1992.

This case has a long history of State and Federal Court rulings. In an effort to keep the proper focus on what has happened to date, this court, rather than incorporating by reference former opinions and actions taken in this matter (as has been done from time to time in the past), is going to impose upon the readers of this opinion and attempt to capsulize the events of the past sixteen (16) years.

In October 1976, a Hudson County Grand Jury returned Indictment 73-76 charging Vincent James Landano (hereinafter, Petitioner), Allen Roller, Victor Forni and Bruce Reen with felony murder (N.J.S. 2A:113-1 and 2), three counts of armed robbery (N.J.S. 2A141-1 and 2A:251-5), breaking and entering with intent to steal (N.J.S. 2A:94-1), receiving a stolen motor vehicle (N.J.S. 2A:139-3), possession of a firearm without a permit (N.J S. 2A:151-41), and conspiracy to commit armed robbery and murder (N.J.S. 2A:98-1).

Co-defendants Forni and Reen were severed from the trial of Petitioner and co-defendant Roller. On April 18, 1977, pursuant to a plea bargain, co-defendant Roller entered a plea of non-vult to the felony murder charge. Petitioner's jury trial commenced the following day, April 19, 1977.

On May 17, 1977, the jury found Petitioner guilty on all counts. On that same day this Court imposed a life sentence on Petitioner for the felony murder count. On June 9, 1977, after merging several of

the remaining counts, this Court imposed an additional consecutive sentence of seven to fifteen years.

Victor Forni and Bruce Reen were subsequently tried and convicted on the conspiracy charge. They were acquitted on all other counts.

On June 19, 1977, Petitioner filed an appeal with the Appellate Division. On September 26, 1978, Petitioner filed a second motion with the Appellate Division seeking to have the matter returned to this Court for consideration of a new trial motion. This second motion was granted.

The new trial motion involved 1.) an alleged recantation by Roller, who was then in the State penal system, of Petitioner's involvement in the crimes; 2.) evidence allegedly linking co-defendant Forni to an earlier robbery in Jersey City which contradicted Roller's testimony that while he (Roller) was involved, Forni was not; and 3.) a claim of prosecutorial misconduct in allegedly suppressing evidence that Roller, Forni and Reen were possibly linked to two robberies in Perth Amboy which predated the crimes involved in this case.

This court held three (3) days of evidentiary hearings and denied the motion for a new trial. (Opinion dated December 1, 1978).

On March 21, 1980, the Appellate Division affirmed this Court's denial and also denied petitioner's direct appeal of the verdicts.

On July 8, 1980, the New Jersey Supreme Court denied certification. *State v. Landano*, 85 N.J. 98 (1980).

Appendix A

On March 31, 1982, Petitioner filed another petition for post-conviction relief. Since this trial judge was in retirement, the matter was assigned to, and heard by, the Hon. Joseph P. Hanrahan, J.S.C. (now deceased). In that action, petitioner argued the following points:

1.) A so-called "Allen" charge;

2.) Newly discovered evidence of coercing identification testimony from witness Jacob Roth;

3.) Newly discovered evidence of coaching witness Raymond Portas by the Prosecutor in reference to his identification evidence;

4.) Newly discovered evidence concerning Officer Snow;

5.) Accumulation of alleged prosecutorial misconduct leading to the need for a new trial;

6.) Allegations of lost photographs;

7.) Portas' alleged identification unfairness.

Following evidentiary hearings on these issues, Judge Hanrahan denied Petitioner the relief sought and issued several letter opinions detailing his reasoning.

On January 30, 1984, the Appellate Division upheld Judge Hanrahan's disposition of these issues. The subsequent Petition for Certification was denied by the New Jersey Supreme Court on June 13, 1984.

On October 10, 1985, Petitioner filed a petition for a writ of habeas corpus in the U.S. District Court of New Jersey. The matter

was assigned to the Hon. H. Lee Sarokin, who considered the following issues:

1.) Portas' identification testimony;

2.) Suppression of exculpatory impeachment testimony of Roller;

3.) Suppression of exculpatory impeachment testimony of Roth;

4.) The "Allen" charge of this Court.

On September 29, 1987, Judge Sarokin denied relief.

On September 9, 1988, the U.S. Third Circuit Court of Appeals affirmed Judge Sarokin's disposition of the petition. *Landano v. Rafferty*, 856 *F.2d* 569 (3d Cir. 1988). A subsequent petition for certification was denied by the United States Supreme Court on February 21, 1989. *Landano v. Rafferty*, 109 *S.Ct.* 1127 (1989).

On June 7, 1989; Petitioner filed a motion with U.S. District Judge Sarokin seeking reconsideration of his denial of habeas corpus relief. Petitioner also made an ex parte application for a temporary restraining order.

On June 8, 1989, Judge Sarokin granted the temporary restraining order and Petitioner's counsel was permitted to review various State documents.

On July 27, 1989, the District Court issued a conditional writ of habeas corpus requiring the State of New Jersey to release Petitioner unless a new trial commenced within 90 days. The

following day, July 28, 1989, the District Court also ordered Petitioner released on bail.

On February 27, 1990, the U.S. Third Circuit Court of Appeals reversed the District Court and directed said court to "... vacate the order conditionally granting the writ of habeas corpus and dismiss Landano's petition. We also direct the District Court to vacate all orders it issued in this matter subsequent to its initial order denying Landano's petition."

Certification was denied by the United States Supreme Court on October 1, 1990. *Landano v. Rafferty*, 111 *S.Ct.* 46 (1990).

Petitioner thereafter filed a new petition for post-conviction relief with this Court. Petitioner's attorney, by letter to this Court dated February 7, 1991, stated that in the Federal Courts he had "conceded that all of the issues raised or suggested by the "Pasapas Report" and the "ID on Landano" document were previously presented to the State Courts." Also, during oral argument before this Court on February 15, 1991, Petitioner's attorney once again agreed that the above issues were previously presented and thus barred under *R. 3:22-5.* (cf. pages 4 & 5 of this Court's April 8, 1991 letter opinion). The petition for post-conviction relief was denied in a letter opinion dated March 4, 1991.

On March 12, 1991, the Hudson County Prosecutor, through Asst. Prosecutor Susan B. Gyss, moved for a rehearing on petitioner's post-conviction relief application. A hearing was then held by this Court on March 22, 1991.

On April 8, 1991, this Court denied the Prosecutor's petition.

On March 12, 1992, the Appellate Division remanded this

matter for a full evidentiary hearing as discussed in the opening paragraph of this opinion.

I

As stated by this Court in its opinion dated December 1, 1978, on Petitioner Landano's motion for a new trial[1], at page 3:

"This Court concludes and finds that a fair interpretation of the facts adduced at trial would be as follows:

"On August 13, 1976, at approximately 9:00 a.m., two white males held up at gun point one Jacob, Roth, trading as the Highway Check Cashing Service located at 40 Jacobus Avenue, Kearny, N.J. During the course of this armed robbery a Newark police officer, John Snow, who was delivering money to the trailer where this business was conducted, was shot and killed by one of the participants.

"Shortly thereafter four suspects were arrested: [Petitioner] Vincent James Landano, Allen Roller, Victor Forni and Bruce Reen. All four were subsequently indicted by the Hudson County Grand Jury and charged among other things with armed robbery, first-degree murder of a police officer and conspiracy to rob and murder.

"Because of various legal and factual considerations this court severed defendants Forni and Reen from the trial of defendants Roller and Landano. As the Roller and Landano trial was about to commence, on May 19, 1977, defendant Roller made a plea arrangement with the State and entered a plea of *non vult* to felony

---

1. Once again this Court wishes the readers of this opinion to keep in mind all that has transpired to date and asks patience in rereading prior material.

murder. As part of the plea bargain Roller agreed to testify against defendant Landano at his trial.

"At the Landano trial, Roller testified that originally he and a man named David Clyburn had planned to rob the check-cashing service but that Clyburn withdrew, and Forni agreed to provide him with another person to help commit the robbery. Clyburn was named in the indictment as an un-indicted co-conspirator and was also a State witness. His testimony generally corroborates Roller's; *viz.*, that he was involved in the initial planning of the robbery but withdrew out of fear for his own safety. Both Roller and Clyburn testified that they and Forni familiarized themselves with the location of the robbery site by driving several times from Staten Island, N.Y., where all of these individuals lived, to the area where the trailer was located in South Kearny. Forni's car was the one used to make these preliminary surveys in New Jersey.

"Roller further testified that Forni introduced him to defendant Landano and that, when invited, Landano agreed to do the job with him. Throughout his testimony, Roller constantly involved Forni in the planning of the crime but insisted that Forni was not involved in the actual armed robbery and murder. He testified however that Forni drove him and Landano to New Jersey on the date of the incident and was physically present when the car to be used in the crime was stolen at the Bayonne Barrel Co., Newark, N.J. His testimony was that Forni then withdrew and was not physically present at the scene. Testimony of other eye witnesses to the crime corroborates that two white males actually participated in the armed robbery and murder and that there was no black male involved. The relevance of this testimony will be discussed below.

"Roller testified at length as to Landano's involvement in the crime. He stated that he met Landano two days prior to the robbery at Landano's apartment, which he described, and that on the next day another preliminary run was made to the robbery location, this

time with Landano. Roller testified that on the morning of the robbery, he met Landano at Forni's house. All three went to New Jersey in Forni's car and Roller stole an automobile for the purposes of the robbery. Roller and Landano left in the stolen car, and proceeded to commit the crimes while Forni presumably returned to Staten Island.

"Roller, after driving past the scene twice, drove the automobile into the parking lot of the check-cashing service. He and Landano left the vehicle and approached a customer who was sitting in a van; he instructed Landano to force this person to lie under the van. Roller then approached the check-cashing service which was located in a trailer, and attempted entry. He could enter only by breaking the door window and by opening the door from the inside. Upon entry, Roller took a drawer used to store money and fled while the occupants of the trailer lay on the floor. As he left the trailer, Roller saw Landano approaching from the vicinity of a police patrol car holding an attache case. Landano ran to the driver's position of the stolen car and Roller dove through an open window into the back seat, leaving the cash drawer on the roof of the car. Landano at this point, according to Roller, stated that he had to "ice" or "waste" the police officer, and they both then drove from the scene.

"Although the original plan encompassed the use of the stolen car as a means to return to Staten Island, Landano took the wrong direction and drove the car to the end of a street with no outlet and into a grassy area. After exiting the vehicle Roller placed two packets of money from the attache case into his waistband and, at Landano's suggestion, threw both his revolver and the pistol used by Landano into a nearby body of water.

"At this point, Roller and Landano left the scene independently. Roller traveled to Forni's house, arriving between

10:00 and 10:30 that same morning; Landano arrived shortly thereafter and the money was divided. Later that day, Landano went to Roller's house with Forni, Landano appearing to have removed the moustache which he had during the robbery. Landano suggested to Roller that he remove his own beard and moustache. Landano indicated that he was going to the New Jersey shore area and also suggested that Roller leave the area.

"During the course of this testimony, Roller identified Landano and the jacket and hat which Landano was wearing that day. Although Roller could not remember if the hat was worn during the robbery, both were found at the scene of the abandoned stolen car. Roller also identified the pistol used by Landano which was found by the authorities in the water near the location of the car.

"In addition to Roller's implication of defendant Landano as his accomplice, the State at trial also produced eye witnesses who testified that two white males participated in the criminal incident.

"Jonathan Roth, a college student at the time, and son of the owner of the check-cashing service, testified that he was in the trailer when the robbery occurred and that two white males were involved. He made an in-court identification of defendant Landano as well as a photo identification and testified that Landano was one of the men involved.

"Another eyewitness, Jacob Roth, owner of the check-cashing service also identified defendant Landano in court, as well as by photograph, as a co-participant. He also referred in his testimony to two white males. It was he who wrote down the license plate number of the getaway car which was subsequently found and was the same car Roller alluded to in his testimony as having been stolen specifically for the robbery.

Appendix A

"A third eyewitness, Raymond Portas, a truck driver at the time, testified that shortly after the time of the incident he observed defendant Landano driving the get-away car in a frantic manner in the area of the trailer. He saw two white males in the car an identified defendant by an in-court identification and through a photographic identification as the driver of that vehicle. He also took down the license number of the car which was later found abandoned in the general area and it was the same car Roller said he had stolen previously. . . .

"The principal thrust of the defense in the trial was alibi, and obviously the jury was not too impressed with this evidence. This court was equally unimpressed. A reading of the trial transcript indicates the weaknesses of this asserted defense. The testimonial evidence as well as the physical evidence all combine to indicate that a reasonable jury could not possibly have come to any other verdicts in this case but guilty." See opinion of this court, dated December 1, 1978, p. 3 to 9.

II

"Basapas/Pasapas Report"

One of the two main issues that this court was to explore in the evidentiary hearing is what has become known as the "Basapas/ Pasapas Report." The report is a Kearny Police Department Continuation Report for the days of January 18 and January 19, 1977, detailing the activities of Detective Edward Rose in the investigation of Officer John Snow's murder. Defendant's Exhibit 16 is a copy found in the Hudson County Prosecutor's file, and Defendant's Exhibit 17 is a more legible copy found in the Kearny Police Department file. See also S-4. The Petitioner states that he first became aware of the existence of this particular document after

having viewed the files of Jack Littman, Esq., who had been Victor Forni's attorney.

The report indicates that on January 18, Detective Rose and Lieutenant Hart obtained a 17 picture spread[2] and sought out the following witnesses; Jonathan Roth, Anne Marie DeMichello, Jose Alverez, Christopher Calabrese, and one Mike Devito.[3] Entry #1 indicates that Jonathan Roth was out of country and not expected back until "around" February 1, 1977. Entry #2 was for "Ann [sic] Marie the watiress [sic] at the B&J Diner" who "tentatively identifed [sic] a Photo of Roller as being in the diner on August 13th 1976." The officers were unable to take a statement from her at that time, so they arranged to return the following day, 1/19/76. Entry #3 was for "Mr. Alverez at the Bayyone[sic] Barrel co. [sic]." Mr. Alverez was not at work so the officers made arrangements to speak with him on 1/19/76. Entry #4 was for Mr. Calabrese, a lunch truck operator, who could not be located on that date. Uniformed personnel were instructed to have him contact Rose and Hart. Entry #5 concerned a request for a copy of entries made on [what appears to be] 8/13/76. Entry #6 involved a contact with Mike Devito, who would not be available to make a statement until Sunday, January 23, 1977.

For January 19, 1977, the following information is reflected. Slightly below and to the right of the date, there is a short entry indicating that "Arrangements made to take statements" with a date

---

2. Although always referring to a 17 picture spread, Det. Rose gives that spread varying identifications: 21529 to 21544, 21528 to 25144, and 21528 to 21544. This court finds that the actual spread involved photos numbered 21528 to 21544. See S-15, 17 photo array numbered 21528 to 21544.

3. There are numerous misspellings, typos and type-overs throughout Det. Rose's work. When referring to a particular document, the spelling used in that document will be placed in italics.

of either 1/22/77 or 1/24/77, the exact day being obscured by a tyoe-over. Entry #1 indicates that Det. Rose was able to contact Jose Alverez at "Bayonne Barrell" [sic] who identified "picture # 21534 as resembling [sic] the man whom he saw in the early AM of 8/13/76 near the coffee truck. This picture is of one Frances Smyth." Entry #2 states "I then stopped at the Modern Transporttation [sic] and spoke to Joseph [B/P]asapas who requested to see more pictures. He was shown the 17 picture [spread] #21529 to 21544 and he picked out # 21532 Victor Forni as resembling the man who drove the car away. from the scene of the holdup on 1/13/76." The first letter of the individual's Sir name as it is written is obscured by either a typo or a type-over, and for the sake of clarity shall be referred to throughout this opinion as *Joseph Pasapas*. Entry #3 for 1/19/77, which is the final entry on this document, indicates that Rose showed John DeMur[i]tz "a spred [sic] of 17 pictur[es] numbered on the back 21528 to 25144 [21544] and he picked out #21528 as the man who er red the Trailer of Hi Way Check cashing service" on 8/13/76. Rose also had DeMuritz "look at the photo that he initialed and dated on August 17th 1976 and have him initial and date this photograph as the one he identified as the man who [word obscured] and heldup the HiWay check cashing service on 8/13/76. The identity of t[he] man in both photos is Allen Roller."

A

Petitioner argues that the selection of Forni as "resembling" the driver of the car by "Joseph Pasapas", whether "Pasapas" is actually a previously undisclosed witness or is a spelling corruption of "Joseph Lapas" (alternate theories put forward by Petitioner), was highly exculpatory evidence which would support Defendant's position that he was framed by the "Breed." Because there is absolutely no other reference to a "Joseph Pasapas" found in any other document conn ted with this case, Petitioner has sought to bolster his position b arguing at the evidentiary hearing that the

documentation strongly suggests that a supplemental statement was taken from "Joseph Pasapas," but that this statement was either lost or destroyed by the State. This position is based upon three points: First, the reference in the "Pasapas Report," D-17, that "[a]rrangements [were] made to take statements"; Second, the existence of statements from four of the witnesses mentioned in the "Pasapas Report," entered as D-18, D-19, D-20, and D-32; and Third, that with the exception of "Joseph Pasapas," all of the witnesses mentioned in the "Pasapas Report" were also mentioned in a subsequent continuation report, D-31.

The entry "[a]rrangements made to take statements" is significant to the Petitioner because in their interpretation of the document, this indicates that a statement of one "Joseph Pasapas" was to be taken on either the 22nd or 24th of January, 1977. Referring to Volume I of the Transcript:

DIRECT EXAMINATION OF NANCY ERIKA SMITH[4]

Q. Now, in the Pasapas Report Detective Rose refers to coming, planning to come back on January 22, 1977 to take a statement from Pasapas as well? A. Yes.

Q. Did you and the team you worked with look for the statement that Detective Rose was going to take from Mr. Pasapas? A. We certainly did.

Q. Did you and your team do a thorough search for that statement? A. Yes.

---

4. Ms. Smith is a law partner of Mr. Mullin, as well as his wife.

Q. Did you find any such statement? A. No.

Q. Did you find it in the Prosecutor's file? A. No.

Q. Did you find it in the Hudson County Prosecutor — in the Kearny Police Department file? A. No.

Q. And you see that the Pasapas Report — I will work with Defendant's Exhibit 17 — says Pasapas was shown a 17-photograph spread? A. Yes.

Q. And that this man selected a photograph of Victor Forni, right? A. Yes. *T.I, 44-20 to 45-25.*[5]

CROSS EXAMINATION

Q. You have had an opportunity to review all the discovery in regard to this matter pertaining to the issue of the paragraph in Detective Rose' report concerning Basapas and/or Pasapas, correct? A. Well, no, I haven't. It refers to a, a statement that was going to be made, and that statement wasn't in the file. So I, I have looked at —

Q. Accepting that comment as true, as to a statement that was subsequently to be taken, is there any other reference in any other report pertaining to the name of Basapas/Pasapas? A. Well, there is a reference to someone else with a very similar name who worked,

---

5. There are four transcript volumes from the Evidentiary Hearing, and are designated as T.I, T.II, T.III & T.IV.

really worked at Modern Transportation and that gentleman is Gus Lapas. Every reference —

Q. Is it not a fact he did not work at Modern Transportation but only a lunch truck that would go from business to business? A. Right. He didn't work for Modern Transportation. His employment, his coffee truck was at Modern Transportation. That's where Prosecutor's Office personnel and police officers talked to him.

Q. Periodically he would be at Modern Transportation? A. That is where they met him according to the documents I have seen and he was identified as a person who saw the guy driving down the street. So, he is, when you say have I reviewed everything regarding Basapas/Pasapas, I have seen references to that gentleman with a very similar name reached at Modern Transportation who saw the guy driving down the street. *T.I, 119-25 to 121-9.*

DIRECT EXAMINATION OF EDWARD ROSE

Q. Okay. Now, next to the entry for the 19th it says: Arrangements made to take statements 1/22/77. Was that, was that referring to the people you had interviewed on the 19th? A. Yes.

Q. Okay. But it was your intention to — A. Yes.

Q. — take statements on the 22nd, okay.

Mr. Gardner: Excuse me, Mr. Mullin. The 22nd? What report are you referring to? Your Honor, as to D-17, the type-over on the date, it is the 22nd or the 24th of '77.

Mr. Mullin: It is not of any significance to me. *T.III, 27-15 to 28-4.*

Looking at the existing documents which relate to D-17 it appears that the entry "[a]rrangements made to take statements" refers as much (if not more) to witnesses listed for January 18 as to those listed for January 19, and that those statements were to be taken on January 24 rather than January 22. First, the January 18, 1977 entry showing that Det. Rose interviewed "Ann [sic] Marie the watiress [sic] at the B&J Diner," indicated that a formal statement was to be taken on the following day, 1/19/77. See D-17. However, the statement of Anne Marie DeMichello, in evidence as D-18, indicates that Ms. DeMichello actually made her formal statement on 1/24/77.

Second, we have D-20, which is a partially typed and partially handwritten statement of Christopher Calabrese. The typed portion has a date of 1/24/77, some identifying information, and a single question which reads:

> I am Det Edward Rose of the Kearny Police Department and now I show you 17 photos of males, can you identify any of these men as being at your coffee truck on Friday August 13th 1976?
> Answ?

Following this, in the space provided, there is a handwritten answer which reads:

> #21542 is the closest to the guy I remember being at the truck but heavier.[6]

6. #21542 is a photo of Vincent James Landano. S-15.

This is followed by the signature of the declarant, Christopher Calabrese, and the signature of the witness, Detective Rose. Mr. Calabrese testified at the hearing that the signature was in fact his but that the remainder of the handwriting was not, although it had been written before he signed it. *T.IV, 45-15 to 46-3*. At the top of the document, in the space provided for the date, there is a single line through the word "January." Above this, but not obscuring the "original" typed date of January 24, 1977, is the handwritten date of "Feb 10, 1977", followed by stylized initials, the first of which is clearly an E, though the second is illegible. See D-20.

The clear implication is that this document was prepared for January 24, 1977, but that the interview with Mr. Calabrese did not occur until February 10.

Still looking at the January 18th entries on D-17, entry #1 shows that Detective Rose was unable to contact Jonathan Roth as he was out of the country at that time. Jonathan Roth is next mentioned in a January 24, 1977, entry found in the Kearny Police Continuation Report marked as D-31, indicating that Detective Rose had again attempted to reach him.

There are three remaining entries for January 18, 1977, found in D-17. As mentioned above, entry #3 concerns Jose Alverez who Det. Rose attempted to contact at the "Bayyone" Barrel Co. in Newark. The entry states that having failed to find Mr. Alverez at that location, arrangements were made to speak with him on January 19. This is similar to a notation found in entry #2, concerning Det. Rose's failure to obtain a statement from Anne Marie DeMichello. Unlike Ms. DeMichello, who, as already discussed, was not contacted until January 24, Mr. Alverez was reached on January 19, 1977, at the Bayonne Barrel Co. See D-17. See also S-5, Statement of Jose Alverez dated 1/19/77: *unsigned*. A

subsequent interview with Mr. Alverez occurred on January 24, at which time a signed statement was executed which reflects the same information contained in the unsigned statement of January 19, 1977. See D-32. A copy of the signed statement, dated 1/24/77, is also found in S-5.

Entries 5 and 6 for January 18 are of no particular significance, except to note that Mike Devito is again referenced in D-31 as having been contacted several times without any statement having been made.

As mentioned previously, there are three entries for January 19 on the "Pasapas Report". The first entry concerns Jose Alverez, which as already noted, indicates that Det. Rose did in fact contact him on that date. The third entry concerns John "DeMuritz", who identified photo #21528 as the man who entered the trailer at Hi Way Check Cashing on 8/13/76, and who also re-identified a photo he had selected and initialed on 8/17/76. This interview is also reflected in the Continuation Report marked D-31, though the sequence of events is reversed: the witness first "reidentified the previous photo of Allen Roller," and was then shown the group of 17 numbered 21528 through 21544. The entry on D-17 also indicates that two separate statements were taken at that time, although only the statement concerning the reidentification was presented to this court. See D-19. The only entry in D-17 which is not referenced in any other document is the January 19 entry concerning Basapas/ Pasapas and the selection of photo 21532, Victor Forni, as "resembling the man who drove the car away from the scene of the hold-up on 8/13/76."

All together there were seven individuals mentioned in the "Pasapas Report," D-17. Of the seven, two gave statements on January 24, 1977: Anne Marie DeMichello and Jose Alverez. The

record also shows that on January 24 Detective Rose reached out (unsuccessfully) to Jonathan Roth, and that he (Rose) had a partially prepared statement ready for Christopher Calabrese's signature. Taken together with the fact that January 24, 1977 was a Monday, and thus a more likely day to find *all* the above named individuals at their respective places of work than Saturday the 22nd, and with this Courts observation that the date simply looks more like 1/24/77 than 1/22/77, this Court finds as a fact that the date referred to in the "Pasapas Report" is 1/24/77. Additionally, because the record clearly indicates that Detective Rose secured statements from the above mentioned witnesses, this Court further finds that the entry referred to neither a specific witness nor only to witnesses interviewed on 1/19/77, but referred instead to those witnesses listed under both 1/18/77 and 1/19/77.[7]

That said, however, the question of whether Detective Rose ever took a statement from one "Joseph Pasapas" on 1/24/77, or any other subsequent date, remains.

During the evidentiary hearing Detective Rose was asked by Defense counsel whether there had been some "follow-up" on the

---

7. Looking at D-17, it appears that before making his first entry for 1/19/77, Det. Rose made the entry in question, although they appear to have been typed contemporaneously. It will also be observed that the date "WEDNESDAY JANUARY 19th 1977", is set at a different margin and angle than either the entry in question or the entries for that date, indicating that the paper was removed at one point and that it was not typed contemporaneously with the other information. As such, the entry "[a]rrangements made to take statements . . ." could refer exclusively to the entries preceding it. Additionally, the fact that statements from two of the three witnesses interviewed on 1/19/77 were produced on that same day could have led this court to conclude that the entry referred in its entirety to witnesses interviewed on 1/18/77, notwithstanding the fact that Mr. Alverez executed a signed statement on 1/24/77. However, as there was no testimony concerning this discrete point, this court will not find as a fact that the reference had no relationship to 1/19/77.

witnesses mentioned in the "Pasapas Report." *T.III, 28-8 to 12.* Defendant's Exhibit 31, mentioned previously, is a Kearny Police Continuation Report filed by Detective Rose detailing his investigation of the Snow murder between January 19 and February 10, 1977. The document makes reference to the following individuals: John DeMaritz, "Ann" Marie DeMichello, "Johnathan" Roth (twice), Jose Alverez, Mike Devito, and Christopher Calabrese. The first entry, dated January 19, 1977, concerns the reinterview Detective Rose conducted with John "DeMaritz" which, as mentioned previously, may also be found as the final entry in the Continuation Report marked D-17. There are then three entries for January 24, 1977, the first of which is that Detective Rose showed the "same group of 17 photos" to Anne Marie DeMichello of the B&J Diner, who identified "#23806" as the man she thought she had served on the morning of "8/13/77." Presumably, Detective Rose was referring to the group of photos shown to DeMichello on 1/18/77, and that the date 8/13/77 was a typo of 8/13/76. The second entry for January 24, 1977, concerned another attempt to contact "Johnathan" Roth, who was still out of the country. The third entry for January 24, 1977, was that Detective Rose again contacted Jose Alverez who, as on 1/19/77 (D-17), selected picture #21534 as "closely resembl[ing]" the man he saw near the coffee truck on the morning of 8/13/76. Mr. Alverez failed to identify any of the suspects. This is followed by an entry for February 8, 1977, wherein Detective Rose notes that "Johnathan" Roth had returned to the U.S. but had already departed for college and would not be available until "sometime near Easter." There is then an undated entry concerning Mike Devito, indicating that although Mr. Devito did not appear to have any significant information, Detective Rose would continue to try and get a statement from him. The final entry, dated February 10, 1977, shows that Detective Rose "re-interview[ed]" Christopher Calabrese at one of his coffee stops and had him look through the 17 photo spread, #21528 through #21544. Mr. Calabrese identified

photo 21542 as being "closest to the guy he saw at his coffee truck" on the morning of 8/13/76, that being a photo of Vincent James Landano.

The facts, therefore, concerning whether a subsequent statement of "Joseph Pasapas" was ever taken may be summarized as such: 1) that there was a general reference contained in the "Pasapas Report" to the effect that arrangements were made to take statements on "1/24/77" of an unspecified number of the witnesses who were contacted by Detective Rose on the 18th and 19th of January; 2) that of those witnesses, two gave signed statements on the 24th, another one was unsuccessfully sought out on the 24th, and a fourth was apparently expected to give a statement on the 24th of January; 3) that of all the witnesses mentioned in the "Pasapas Report," D-17, only "Joseph Pasapas" is not mentioned in the continuation report marked as D-31.

Drawing upon these facts, the Petitioner has made the following corollary: Follow-up statements were to be taken of witnesses; Statements were taken from some witnesses; Therefore, a statement of "Joseph Pasapas" must have been taken. The evidence adduced at the hearing, however, does not support this deduction. It was incumbent upon the Petitioner to present the Court with some proof that a statement was in fact taken or at least that it was Detective Rose's intent to take such a statement. The mere fact that the thing sought cannot be found will not serve as proof of its existence in a court of law. Additionally, this court finds that the evidence presented to it actually demonstrates that such a statement never was taken. Rather than adding strength to Petitioner's position that a statement of "Joseph Pasapas" was taken on or about January 24, 1977, D-31, which details the "follow-up" on the witnesses listed in D-17, seems to exclude all possibility of such an event ever having occurred. As such, this Court finds as a fact that there never was a statement of a "Joseph Pasapas" made after January 19, 1977.

Appendix A

B

As mentioned previously, Petitioner's position has been that "Joseph Pasapas" is either a previously unidentified witness or a misspelling of Gus Lapas, whereas the State has taken the position that "Joseph Pasapas" is in fact a misspelling of Joseph Pascuiti, the error being the result of poor typing skills, inattention to detail, or a transposition of several witnesses' names.

The evidence presented at the evidentiary hearing concerning the "true" identity of "Joseph Pasapas" focused in large part upon the inconsistencies in Detective Rose's work product, primarily the spelling of Pascuiti's name and the name and address of his employer. See *T.III, 38-19 to 40-6.*

1.) A Kearny Continuation Report, dated 8/13/76, on the second of three pages, indicates that Detective Rose spoke to "Joseph Pascuto," employed by "Modern Transportation," which was located "next door to Jack Roth's."

2.) A Kearny Continuation Report, dated 8/16/76, by Detective Rose; "Joe Pascuto — Modern Warehouse — daw [sic] dark haired guy." See S-5.

3.) A Kearny Continuation Report, dated 8/19/76, by Detective Rose; "Joseph Pscuto of the Metropolitan Trucking Co. of 46 Jacobus Avenue . . ." Picked out Bruce Reen. See S-5; See also D-25 and D-35, same document, recovered from Prosecutor's file and Kearny Police Department file, respectively.

4.) A Kearny Continuation Report, dated 8/23/76, by Detective Rose; "Joseph Pascuiti, Metro Trucking, who stopped on two pictures, one was Forni but he replied he could not positively I.D. either of them." See S-5.

Appendix A

5.) A Kearny Continuation Report, dated 8/26/76, by Detective Thompson; "Joseph Pascuto, Modern Warehouse, negative." See *T.III, 84-22.*

6.) A Kearny Continuation Report, dated 8/26/76, by Lieutenant Hart; "Joseph Pascuto." See D-37.

7.) Handwritten notes of Detective Thompson made on or about 8/26/76, the "I.D. on Landano" Document (discussed infra); "Joe Pascuto." See D-22.

8.) A Kearny Continuation Report, dated 8/31/76, by Detective Rose; "We then went to Modern Transportation — 42 Jacobus Avenue, So. Kearny, to speak to Joe Piscullo and showed him the newly acquired mug shots but he could not identify anyone.[8] He requested that if we do get anymore photo's to try for a profile shots as he remembers man from profile." See S-5.

9.) A handwritten witness list prepared by former Assistant Prosecutor Mulcahy, undated; "Joe Pascuito, Modern Warehouse, 42 Jacobus Ave. Saw incident — corroborates McCormick. NB See if he can say no beard on shooter. 8/19/77 Picks out Reen's photo - not positive 8/26 Neg on *L.* 8/31 - Neg on *L.*" See D-12.

Although each document references an individual with the first name of "Joe" or "Joseph," there are five different last names: Pascuto, Pscuto, Pascuiti, Piscullo, and Pascuito. The only place where Joseph Pascuiti's name is recorded accurately is the Rose report of 8/23/76. Besides Mr. Mulcahy's notes, the only documents

---

8. "Newly acquired mug shots" is a reference, at least in part, to a more recent photo of Vincent James Landano than was shown to witnesses on 8/26/76. This point is discussed more fully in a later section.

which accurately reflect the name of Joseph Pascuiti's employer are the Rose report of 8/16/76 and the Thompson report of 8/26/76. Additionally, Detective Rose's report of 8/31/76 provides the correct address, though wrong name, of Pascuiti's employer, while his report of 8/13/76 accurately describes the location as being "next door" to the crime scene.

While each of these entries varies from the preceding one, just as the subsequent entry varies from it, this Court finds that there are enough similarities to say unequivocally that they all refer to Joseph Pascuiti, who was employed at Modern Warehouse, 42 Jacobus Avenue, situated "next door" to Highway Check Cashing.[9]

Between 8/31/76, when Joseph Pascuiti gave a negative I.D. of Petitioner, and 1/19/77, the date "Joseph Pasapas" selected a photo of Victor Forni, this Court can find no documents referencing Joseph Pascuiti. Nor, for that matter, can this Court find in the documentation presented much in the way of investigative work between early September 1976 and January 1977; i.e. none of the other witnesses are mentioned in this intervening period either.

At the evidentiary hearing, the Court heard from two State's witnesses concerning the possible existence of "Joseph Pasapas." Dennis Stellato, a supervising state investigator for the New Jersey Division of Criminal Justice, testified as to his efforts in determining the "existence or nonexistence" of "Joseph Pasapas." See *T.IV, 24-7 to 32-1.* Mr. Stellato ran a check on the names "Pasapas," "Papasapas," and "Basapas," and variations of those names, with the following agencies; the New Jersey Division of

---

9. The most common misspelling, "Pascuto," is found in D-22, the "I.D. on Landano" Document, and has been adopted by Petitioner as in fact being a misspelling of Pascuiti. See *Defendant-Petitioner's Proposed Findings of Fact and Conclusions of Law*, pp. 19 to 20.

Motor Vehicles, the New Jersey Division of Taxation, New Jersey Unemployment, and the U.S. Health and Human Services Agency. Mr. Stellato also stated that the names were checked through N.C.I.C. in the event there were any outstanding warrants for persons by those names. He testified that the results were negative. On cross-examination, Mr. Stellato conceeded he did not personally know how far back any of these agency checks went and that an illegal alien would probably not show up at all. See also S-11.

The second State witness on this issue was John A. Robbins, treasurer of Spectraserv, Inc., successor to Modern Transportation Company. Mr. Robbins reviewed the employment records of Spectraserv/Modern Transportation for the time period of May 1, 1976 through April 30, 1977, in an effort to determine whether there had been an employee by the name of "Joseph Basapas" or "Pasapas." Mr. Robbins testified that there was no record of any such employee during that time frame. *T.IV, 50-6 to 52-17*, See also S-16, *Certification of John A. Robbins.*

Along these same lines, the State questioned Detective Rose, on cross, as to the "developm[ent]" of witnesses during the investigation. Detective Rose agreed that the bulk of the investigation occurred during the first few weeks following the crime, and agreed that "for the most part any witnesses who were to be developed had been found, spoken to, [and] respoken to, if necessary." *T.III, 58-14 to 22*. Detective Rose testified that at the time his January 19, 1977 Continuation Report (D-17) was prepared they were "reinterviewing everybody, almost everybody as witnesses." Furthermore, in response to the question of whether "[i]n January 1977 were [there] any new witnesses, previously not located, discovered and interviewed," Detective Rose replied that there were not. *T.III, 60-5 to 8.*

As mentioned previously, Petitioner has argued that if "Joseph

Appendix A

Pasapas" is a misspelling for any known witness it probably a misspelling of Gus Lapas. Gus Lapas operated a coffee truck in the vicinity of the crime and had apparently observed the getaway vehicle. The evidence regarding Mr. Lapas' observations consists of the following:

1. D-25, a Kearny Continuation Report of Detective Rose, dated August 19, 1976, indicating that Gus Lapas was "reinterv[ie]wed" at Second Street and Jacobus Avenue. He was shown an array of seven photos and he stopped on Bruce Reen, stating "It looks like the man who was driving the car."

2. S-1, a handwritten affidavit of Gus Lapas given on July 10, 1989, in which he states that during 1976 and 1977, he stopped at "Modern Transportation" on a daily basis, and that during that period he was asked to go to the Prosecutor's Office on two or three occasions to view photographs. He further stated that he had no recollection of whether he ever selected a photo.

3. The evidentiary hearing, where Mr. Lapas testified that on the day of the crime he was parked in the vicinity of Second Street and Jacobus Avenue, near Modern Transportation, which was routinely his first stop of the day. His attention was drawn to the get-away vehicle because as it sped past, a hub cap came loose and struck his truck. He then observed the vehicle turn down Central Avenue. He testified that on one occasion, Kearny Police came to his truck and showed him photos, and that on one or two other occasions he went to the Prosecutor's Office and viewed photos. *T.III, 95-2 to 13.* Mr. Lapas seemed to indicate that on the one occasion when the police showed him pictures at his truck, it was early in the investigation. ("He came and he show me some pictures. I don't remember if he is the same day or day after.") *T.III, 99-5 to 7.* He was unable to recall whether he had identified anyone. *T.III, 95-2 to 13.*

Appendix A

In reviewing this information, this Court concludes and finds that "Joseph Pasapas" is not a misspelling of Gus Lapas. First, besides the "reinterview" of Mr. Lapas on 8/19/76 (D-25), there is absolutely no other report which references Gus Lapas. As such, it is impossible for this Court to determine whether Detective Rose and others had a habit of misspelling Lapas and of attributing a completely dissimilar first name to him.

Second, although his recollection is faded by time, there is nothing in the record to contradict Mr. Lapas' testimony that except for the one photo array shown to him early in the investigation at his truck, he was only shown photos at the Prosecutor's Office.[10] This testimony conflicts directly with the "Pasapas" report which indicates that Detectives Rose and Hart "stopped at the Modern Transporttation [sic] and spoke to Joseph Pasapas who requested to see more pictures."

Third, while the name "Joseph Pasapas" shares four (4) letters in common with the name Gus Lapas, it in fact shares more letters in common with at least two other witnesses; Joseph Pascuiti, with which it shares nine (9) characters, and Adam Papasavas, with which it shares six (6).[11]

---

10. The Court notes that the first day a photo array was shown to prospective witnesses was August 17, 1976. As such, Gus Lapas could not have been shown a photo array on either the day of or the day after the crime. The first, and indeed only documented time that Gus Lapas was shown a photo array was on August 19, 1976. See D-25. The Court finds, however, that this minor inconsistency does not detract from Mr. Lapas' overall recollection of his involvement in the investigation.

11. Papasavas was the Director of Research & Education, Local 1470, 2 Central Avenue, Kearny. On 8/18/76, he gave Kearny Police a positive ID of Allen Roller as being in the area of Local 1470 on 8/13/76. Roller stood out in his mind since pedestrians are rare in that area. Papasavas saw neither the vehicle used nor the second individual involved, and there is no allegation that he is in fact "Pasapas." He is mentioned only to demonstrate that there were other witnesses with similar names.

Appendix A

Fourth, D-12, the handwritten civilian witness list prepared by then Assistant Prosecutor Mulcahy, has an entry referencing Gus Lapas' August 19, 1976 ID of Bruce Reen. In it, Mulcahy writes: "8/19 — Stops at Reen as "looks like" driver — claimed driver had mustache, dark hair." This entry severely weakens Petitioner's position since Victor Forni, by all accounts, never had a mustache.

In contrast to Gus Lapas, there exists a great deal of evidence which links "Joseph Pasapas" to "Joseph Pascuiti." The Court will begin by focusing upon the name itself.

First, in all the August, 1976, references to Joseph Pascuiti, he is consistently given the first name of either Joe or Joseph despite the fact that Detective Rose and others attributed five different last names to him.

Second, upon careful review of all the documents submitted in this hearing, this Court has determined and finds that there is not a single reference to any other witness by the name of "Joe" or "Joseph" who had direct knowledge of the crime (i.e. its execution or flight therefrom).

Third, at the evidentiary hearing, Detective Rose read the "Pasapas" entry as being "Joseph Basapas." *T.III, 56-12 to 16.*[12] This point was seized upon by Petitioner as he sought to show that "Basapas" could not be a misspelling of Pascuiti. Detective Rose's testimony, however, does not prevent this Court from making its own observations of this document.

In other entries on the "Pasapas Report," reference is made to

---

12. The Court notes that prior to this point, Petitioner had consistently referred to a Joseph "Pasapas."

the "Bayonne Barrell" [sic] Co. Even a casual reading of these entries reveals that these two capital "B"s bear absolutely no resemblance at all to the "Basapas/Pasapas" entry. Rather, this Court finds that a fair reading of this entry shows that the two letters involved in this typeover are a capital "O" and a capital "P." The fact that these two letters are located next to each other on the key board lends support to this reading. As such, one of two possible readings of this name, as typed, would match the first three letters of *Pas*cuiti.

The Court next looks at "Joseph Pasapas' " place of employment. The "Pasapas Report" indicates that "Joseph Pasapas" was spoken to "at" Modern "Transporttation" [sic]. At the hearing and in papers filed in connection with it, the Petitioner has argued three points; 1) Since Pascuiti was employed at Modern Warehouse, not Modern Transportation, "Pasapas" cannot be a reference to Pascuiti; 2) "Pasapas" was shown a photo array "at" his place of employment, whereas Pascuiti testified at the hearing that he was only shown photos at the Police Station; and 3) that while Joseph Pascuiti worked at Modern Warehouse, Gus Lapas operated his coffee truck, and was interviewed in the area of, Modern Transportation, and the inference is that he, rather than Pascuiti, is the real "Pasapas."

As with the spelling of Joseph Pascuiti's name, Detective Rose demonstrated an inability to accurately record the name of Pascuiti's employer. In the eight references to Joseph Pascuiti, his place of employment is given four different ways; three times as "Modern Warehouse," twice as "Modern Transportation," once each as "Metropolitan Trucking" and "Metro Trucking." The two entries which give Modern Transportation as Pascuiti's employer, however, both correctly locate the employer as being directly adjacent to Highway Check Cashing; the report of 8/13/76, which puts Modern Transportation "next door to Jack Roth's," and the

report of 8/31/76, which places Modern Transportation at 42 Jacobus Avenue, So. Kearny. As such, the fact that "Pasapas" was interviewed at "Modern Transporttation" [sic] does not serve to exclude Joseph Pascuiti as being the "actual" witness.

The Petitioner also argues that Joseph Pascuiti can not be "Joseph Pasapas" because D-17 indicates that "Pasapas" was interviewed and shown photos "at" his place of work, whereas Joseph Pascuiti testified at the evidentiary hearing that he had only viewed photo arrays at the Kearny Police station. See *Defendant-Petitioner's Proposed Findings of Fact and Conclusions of Law, 16-72, 35-5.*

DIRECT EXAMINATION OF JOSEPH PASCUITI

Q When officers or detectives from Kearny came to see you what would normally occur? A They would come to my employer and, you know, ask to see me, and generally I would go down and talk to them, and there had been occasions I had gone to Kearny Police Department.

Q And on the occasions when you spoke to them would they ever show you anything and, if so, what? A When I was at the Police Department I have showed — they showed me stacks of pictures. *T.IV, 15-7 to 17.*

Q Then after this period of time had elapsed did there come another occasion when officers and/or detectives from Kearny approached you in regard to this matter? A Yes.

Q Would you tell us about that? A The officer was, — The officers would come to my employment and, you know, ask me questions about the incident. And then I would in turn go back to

their Police Department – Nothing was done at the premises. – usually go back to the Police Department, and they would, you know, show me or hand — not hand me — show me pictures, you know not individual pictures, at all times there were stacks of photos, and I looked through them. *T.IV, 20-8 to 22.*

Contrary to Mr. Pascuiti's recollection, however, there is documentary evidence which indicates that he was in fact shown photo displays at his place of employment. D-25, which is a Kearny Police Continuation Report of Detective Rose dated August 19, 1976, clearly indicates that Detectives Rose and Thompson took a set of mug shots to the second precinct and "recanvassed the area." Once in the area, they "proceeded to Ruethers Bar and Grill on Jacobus Avenue, So. Kearny to investigate . . . . ," after which they "proceeded to the B.&J. Restaurant on Old Lincoln Highway and spoke to a Danny Roche, owner . . . [and] Ann Marie De Michello [sic] . . . ." The third entry reads as follows:

> We then proceeded to reinterview Joseph Pscuto of the Metropolitan Truckin[g] Co. of 46 Jacobus Avenue, So. Kearny and showed him seven mug photos of seven males. He picked out the photo of Bruce Reen and stated "He looks like the man but he's not positive".

Following the interview of "Pscuto," Rose and Thompson "then proceeded to Second St. and Jacobu[s] Ave., So. Kearny, and spoke [to] Gus Lapas, owner of the Athens Catering," and then to the area of the Bayonne Barrel and Drum Co.

Within the Continuation Reports marked S-5, we also find that the report dated 8/31/76 clearly states that Detectives Rose and Thompson went to "Modern Transportation" where they showed "Joe Piscullo" the "newly acquired mug shots." The Continuation

Report of August 23, 1976, can also be read as indicating that Detective Rose went out in the field.

This Court, therefore, finds as a fact that Joseph Pascuiti was interviewed and shown photo arrays at his place of employment. As such, the statement that "Joseph Pasapas" was interviewed "at" Modern Transportation does not serve to exclude Joseph Pascuiti.

Although this Court has already put forward its reasoning for excluding Gus Lapas as being the "real" "Joseph Pasapas," there is the connection between Gus Lapas' routine of stopping in front of Modern Transportation, and "Joseph Pasapas" having been interviewed "at" that location, which needs to be addressed. From the evidence presented, this Court concludes that early on in the investigation, Gus Lapas was shown a photo array at his truck once, and that on one or two other occasions such displays took place at the Prosecutor's Office. As discussed previously (see footnote 12) D-25 documents the one time that Gus Lapas was shown photos at his truck;

> We then proceeded to Second St. and Jacobu[s] Ave., So.Kearny, and spoke [to] Gus Lapas, owner of the Athens Catering of 332 Montclair Ave., [Montclair], NJ, whom we reinterviewed . . . .

It will be observed that Detective Rose indicated where this interview took place by writing down the nearest intersection rather than the nearest business establishment. In contrast to this single reference concerning Gus Lapas, seven (7) of the nine (9) references to Joseph Pascuiti indicate some variation of the name of his employer. Viewing D-17 against this background, this Court finds that the fact that "Joseph Pasapas" was interviewed at Modern Transportation serves to include rather than exclude Joseph Pascuiti, while at the same time it tends to exclude Gus Lapas.

Appendix A

D-17 indicates that Detective Rose stopped "and spoke to Joseph Pasapas who requested to see more pictures." This entry could refer to either a preexisting request or one that was made once Rose was there.

In either case, the Continuation Report of August 31, 1976, indicates that Joseph Pascuiti "requested that if we do get anymore photo's [sic] to try for a profile shots as he remembers man from profile." As of that date, therefore, Pascuiti had a continuing interest in trying to identify the shooter/driver.

Petitioner has attempted to show that an inconsistency exists between the "Joseph Pasapas" entry and the overall testimony of Joseph Pascuiti; that Pascuiti focused upon the individual who shot Officer Snow, whereas "Pasapas" picked Forni as "resembling the man who drove the car away . . . ." This Court is not persuaded that such an inconsistency exists. Of the nine (9) documents listed earlier in this section, the relevant information given by Pascuiti was; 1) 8/16/76, ". . . [s]aw dark haired guy;" and 2) 8/19/76, "He picked out the photo of Bruce Reen and stated he looks like the man but he's not positive." This Court finds that there is nothing inconsistent between these statements and the "Pasapas" entry. More to the point, however, is the fact that Joseph Pascuiti testified at trial that the shooter and the driver of the automobile were one in the same. See *S-14, Trial Trans., 8.94-4 to 23*. In fact, his testimony indicated that he was able to make the connection between the shooter and the driver because of the view he got of the driver as he drove away. *Id., 8.101-1 to 4*.

The Court is also aware that during the course of the investigation, Joseph Pascuiti had on at least two occasions selected a photograph of Victor Forni. The first occurrence was on August 23, 1976, where Pascuiti "stopped on two pictures, one was Forni but he replied he could not positively I.D. either of them." See S-5.

Appendix A

The second occasion was sometime in early 1977, when Pascuiti selected Victor Forni's photo as resembling the shooter based upon the hair and "profile" as depicted in the photo.[13/14] See *S-14 Trial Trans. 8.101-19 to 8.102-20.*

The facts, therefore, as to who "Joseph Pasapas" was may be summarized as follows, and this Court finds:

1.) That except for a single entry in D-17, there is absolutely no other proof that an individual by the name of "Joseph Pasapas" exists or ever existed. "Joseph Pasapas" is found in no other document connected to this case, is not listed by State or Federal agencies which maintain records of social security numbers, drivers licenses, tax records, unemployment insurance, or criminal histories, nor was such a person found in the employment records of Modern Transportation;

2.) That there is no documentation that affirmatively supports the theory that Gus Lapas is "Joseph Pasapas," and in fact the available evidence weighs against such a theory;

3.) That Joseph Pascuiti shares eight (8) or nine (9) characters (depending on the reading) in common with "Joseph Pasapas;" That of the nine (9) documents which reference Joseph Pascuiti, his last name is recorded correctly only once (Rose report of 8/23/76), and that even the witness list prepared by former Assistant Prosecutor

---

13. It will be noted that this photo of Forni has been submitted in evidence at this hearing and that it is a full-face shot, not a profile.

14. During cross-examination, Defense Counsel specifically asked Pascuiti whether he had been shown this array in January. He was unable to recall exactly when it was shown, except to agree that other than any displays he may have viewed at the Prosecutor's Office, it was in 1977. (The trial occurred in April of 1977).

Mulcahy (D-12) records it incorrectly ("Joe Pascuito"); That in each of these nine (9) documents, Pascuiti's first name is given as either "Joe" or "Joseph;" That Pascuiti is known to have picked Forni on at least two (2) occasions; That Pascuiti was *shown* photos "at" his place of employment several times; That his employer had been mis-reported several times including two (2) times as Modern Transportation; That Joseph Pascuiti's employer (in whatever form) was mentioned in seven (7) of the nine (9) documents submitted, and that the "Pasapas" entry also named the employer; That on August 31, 1976, Joseph Pascuiti, in the last report in which he is clearly referenced, requested to see more photos, and that "Pasapas" similarly requested to see more photos; That whereas Pascuiti testified at trial that the shooter and the driver were one in the same, he specifically testified as to his view of the driver, just as "Pasapas" spoke of the driver, and; That Detective Rose testified that in January 1977, there were no new witness being developed, only reinterviewing of existing witnesses, and that this testimony is supported by the documentary evidence received.[15]

While none of these facts standing alone would lead this Court to reach a concrete conclusion as the "true" identity of "Joseph Pasapas," when weighed in their entirety this Court finds as a fact that the reference to "Joseph Pasapas" contained in the Continuation Report of January 18/19, 1977, is actually a reference to Joseph Pascuiti.

C

Having found as a fact that "Joseph Pasapas" is actually Joseph

---

15. There was also a copy of the Continuation Report of 1/18/77, submitted by the State, in which Mr. Mulcahy had scratched out "Pasapas" and written in "Pascuiti." See S-4. As the court has no idea where this copy of the "Pasapas Report" came from, it was not given any weight.

Pascuiti, this Court must still consider whether this document, D-17, was in fact suppressed, and if so, whether post conviction relief should be granted.

The evidence presented on this issue can be summarized as follows. Nancy Erika Smith, Esq., co-counsel for Petitioner, testified at the hearing that the Continuation Report of January 18/19, 1977 (D-17), was not present in any of the discovery that was in the possession of Petitioner, his trial counsel, or Mr. Mullin. Ms. Smith stated that they first discovered this document when reviewing the files of Jack Littman, Esq., who had served as Victor Forni's trial counsel. *T.I, 71-1 to 11; 127-18 to 128-7.* This Court does take note, however, that over the past fifteen years, Petitioner has changed attorneys and that many court proceedings have been held in which evidence was constantly being scrutinized, checked and then passed along between the various participants.

On direct-examination, former Assistant Prosecutor Mulcahy testified as to the general practices of the Prosecutor's Office concerning discovery, as well as his own perceptions of what was required of the State. In line with this, he was questioned as to the meaning of Defendant's Exhibits 7, 8, and 9. He stated that he had no recollection of any document which detailed discovery submitted to Petitioner's trial attorney in the fashion that D-7 did.[16] Mr. Mulcahy was also questioned as to the importance of such documents as D-8 and D-9, discovery receipts signed by Reen's and Roller's attorneys, respectively. Mr. Mulcahy conceded that such documents were important, but noted they were not definitive as to

---

16. D-7 is a discovery document listing police continuation reports and statements taken in the period between 8/13/76 and 10/1/76. The first of the six pages has a hand written note by Mulcahy indicating the listed documents were sent to Reen's attorney on 3/30/77, with one copy to Petitioner's attorney and a copy to be made for Roller's attorney.

the materials sent, nor were they more important than actually turning over the materials. See generally *T.I, 143 to 150.*

On cross-examination, Mr. Mulcahy testified that he had a continuing obligation to turn over evidence to the defense, and that exhibits such as S-2, which disclosed the names of two witnesses the State planned on using, and S-3, a cover letter generally outlining supplemental discovery, both of which are dated March 11, 1977, indicate that he was fulfilling that obligation. *T.II, 114-6 to 118-9.* He further testified that due to the "good business . . . and professional relationship" he held with James Flynn (trial counsel) it was not necessary for him (Mulcahy) to receive a receipt for each transmission of discovery. *T.II,* 119-3 to 22. On redirect, Mulcahy conceded that he had no actual recollection of mailing S-2 and S-3, only that it would have been normal business practice. Additionally, he conceded that he had no present recollection of which reports were actually sent at that time although it would have been his practice to have sent all reports in his possession. *T.II, 134-3 to 125.*

Beyond the testimony of Ms. Smith and Mr. Mulcahy, and the documents mentioned (D-7, 8 & 9; S-2 & 3), there is also the trial testimony of Joseph Pascuiti. As has been mentioned previously, Mr. Pascuiti was asked during cross-examination whether he had selected a photo of Forni from an array in January 1977. Though unsure of the exact month, Pascuiti testified that, excluding any displays shown at the Prosecutor's Office, he had been shown the display sometime prior to trial in early 1977. Because this is the same array used by Detective Rose on January 18/19, 1988, the inference is that counsel had knowledge of this display because he had possession of the document, D-17.

In determining whether the State has suppressed evidence, the burden is, of course, upon the Petitioner. *State v. Engel,* 249 *N.J.Super.* 336, 389 (App.Div. 1991). A prosecutor is presumed to

have knowledge of all the evidence present in his files, and such knowledge is imputed to the prosecutor where actual knowledge is lacking. *United States v. Agurs*, 427 *U.S.* 97, 96 *S.Ct.* 2392, 49 *L.Ed.2d* 342 (1976). Additionally, a prosecutor's file is considered to be co-extensive with police files and knowledge of those files contents is similarly imputed to the prosecutor. *State v. Carter, 69 N.J.* 420 (1976), at 429; see also *Giglio v. United States*, 405 *U.S.* 150, 92 *S.Ct.* 763, 31 *L.Ed.2d* 104 (1972).

The evidence presented, in this Court's opinion, implies that the Kearny Continuation Report of January 18/19, 1977, was turned over, but is insufficient for this Court to say definitively that is was. As such, for purposes of argument, this Court will draw the strongest inference in favor of the Petitioner and assume (arguendo) that this document, D17, was not turned over and that it was suppressed by the State.

The question thus becomes whether the State's failure to disclose this document warrants post conviction relief. "The suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or punishment." *Brady v. Maryland*, 373 *U.S.* 83, 87, 83 *S.Ct.* 1194, 1196, 10 *L.Ed.2d* 215 (1963); *State v. Carter, supra*, 69 *N.J.* at 432. The Courts draw no distinction between impeachment evidence and exculpatory evidence. *United States v. Bagley*, 473 *U.S.* 667, 676, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481 (1985). The burden remains upon the Defendant to demonstrate that (1) the evidence was of a favorable character for the defense, and (2) that the evidence was material. *State v. Engel, supra*, 249 *N.J.Super.* at 389.

The suppressed document is arguably exculpatory. On cross-examination, counsel could have used the document to drive home the point that Pascuiti had in fact selected Victor Forni's photograph

in January. On re-cross-examination, as pointed out by Petitioner, trial counsel may have been in a better position to "undo Pascuiti's testimony, on re-direct, that he had not selected a photograph from the array of 17 photographs." See *Defendant-Petitioner's Proposed Findings of Fact and Conclusions of Law*, pp. 34. Such a re-cross could have served to both impeach Pascuiti's testimony and to "exculpate" Petitioner.

In determining the materiality of suppressed evidence, the Supreme Court in *United States v. Aqurs, supra*, developed three different definitions of materiality to cover three general factual settings. *State v. Enqel, supra*, 249 *N.J.Super.* at 389; *United States v. Aqurs, supra*, 427 *U.S.* at 103-107, 96 *S.Ct.* at 2397-2399.

> First, where the prosecution knowingly uses perjured testimony, the Court has held that the conviction will be set aside if there is a "reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 *U.S.* at 103, 96 *S.Ct.* at 2397, 49 *L.Ed.2d* at 349-350. The second situation, illustrated by the facts in Brady, is one in which the defense has made a specific request for the withheld evidence. The Court has determined that the conviction must be vacated if the suppressed evidence might have affected the outcome of the trial. 427 *U.S.* at 104, 96 *S.Ct.* at 2397, 49 *L.Ed.2d* at 350. the third variation is found where the defense has made no request, or only a general one, for the undisclosed material. In that setting, a reversal has been said to be required if the "omitted evidence creates a reasonable doubt that did

> not otherwise exist." *Id.* at 112, 96 *S.Ct.* at 2402, 49 *L.Ed.2d* at 355.

State v. Engel, supra, at 389-390.

More recently, in *United States v. Bagley, supra*, the Supreme Court chose to apply the single standard of materiality put forward in *Strickland v. Washington*, 466 *U.S.* 668, 104 *S.Ct.* 2053, 80 *L.Ed.2d* 674 (1984), which held that withheld materials are material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different;" a "reasonable probability" being defined as "a probability sufficient to undermine confidence in the outcome." 473 *U.S.* at 682, 105 *S.Ct.* at 3383; *State v. Engel, supra*, 249 *N.J.Super.* at 390.[17]

In discussing these developments on the Federal level, the Appellate Division in *State v. Engel, supra*, noted that the New Jersey Supreme Court in *State v. Marshal*, 123 N.J. 1, 200 (1991), declined to adopt the standard of materiality enunciated in *Bagley*. There, in addressing the situation where defendant had made a specific request for the nondisclosed information, the New Jersey Supreme Court held that the standard of materiality remained "whether the suppressed evidence might have affected the outcome of the trial." *State v. Marshal, supra*, 123 *N.J.* at 199; citing *United States v. Agurs, supra*, 427 *U.S.* at 104, 96 *S.Ct.* at 2398. "In essence, the 'might have affected the outcome' test requires the application of a harmless error analysis." *Id.* at 200, citing *State v. Carter*, 91

---

17. The Appellate Court in *Engel* noted that *Bagley* applied the *Strickland* test to those situations involving 'no request,' 'general request,' and 'specific request' cases, but was not clearly made applicable to cases involving the knowing use by the prosecution of perjured testimony.

N.J. 86, 114; *State v. Macon*, 57 *N.J.* 325 (1971). The *Marshal* Court, however, failed to address the third factual situation of *Agurs*, where either no request or only a general request for discovery has been made. That being the case, the Appellate Division in *Engel* could only "assume" that the "sliding scale" analysis originally developed in *Agurs*, and applied in this State in cases such as *Carter, supra*, 91 *N.J.* at 112, had been retained by the State Supreme Court. *State v. Engel, supra*, 249 *N.J. Super.* at 392.

It is this third standard of materiality which is applicable here, and this Court finds that the information contained in the Kearny Continuation Report of January 18/19, 1977, when viewed against the overwhelming evidence of Landano's participation independent of and including the testimony of Joseph Pascuiti, falls far short of the applicable standard by failing to create a reasonable doubt as to Petitioner's guilt.

The specific value of the information contained in this report is highly speculative. The fact is that Joseph Pascuiti was effectively cross-examined by trial counsel as to his inability to positively identify the man he saw shoot Officer Snow and then drive off. Counsel brought out the fact that Pascuiti thought the actor's hair and profile resembled that of Forni's photo. *Trial Trans., 8.102*. He had Pascuiti agree that the actor had "short" and somewhat "curly" hair. *Id., at 8.100*. Pascuiti also testified that the actor did not have a mustache. *Id., at 8.98*. The jury knew, therefore, that Pascuiti had selected Forni as "resembling" the actor who not only shot Officer Snow, but who drove off afterwards.

The Court is similarly unconvinced that possession of D-17 would have altered trial counsel's ability to rebut the re-direct of Pascuiti, or that counsel would in fact have done so. The thrust of re-direct was that Pascuiti was "not certain of anyone." *Id., 8.103.*

Once again, the entry in D-17 indicates that Pascuiti thought Forni "resemb[ed]" the driver. Pascuiti did not give a positive ID of any suspect.

This Court finds that no reasonable doubt as to Petitioner's guilt is raised by the information contained in D-17 in any of its possible uses, sufficient to undermine its confidence in the verdict.[18]

III

"I.D. on Landano" Document

The second principal issue before this Court concerns what has been referred to as the "I.D. on Landano" document (hereafter "Landano Document"). This document consists of a half-page of handwritten references to several witnesses which was found by Defense counsel while inspecting the files of the Kearny Police Department. *T.I, 47-22 to 24*. The document was prepared by William J. Thompson, formerly a detective with the Kearny Police Department, and was entered into evidence as Defendant's Exhibit 22. *T.III, 73-15 to 22*.

The Petitioner argues that the "Landano Document" not only shows that several witnesses actually ruled Landano out as a suspect, but that the document provides corroboration of Raymond

---

18. Petitioner made passing reference to an empty folder found in the Prosecutor's file, which had the following handwritten notation on the outside: "Forni looks like guy who was driving down street — Det. Rose — Pictures of (3) three suspects — 44875." See D-23 & 33. At the hearing, Det. Rose testified that this was not his handwriting and that he did not know whose it was. *T.III, 33-24 to 34-24*. Assuming, arguendo, that this envelope contained the photo of Forni selected by Pascuiti on January 19, 1977, (based on the language) the conclusion of this Court on the "Pasapas Report" remains unchanged.

Portas' "claim that the State improperly used photo arrays." See *Letter Brief of Defendant, 4/29/92, p.14.* This position is based upon an interpretation of the document as "demonstrat[ing] by its language, its wording," that the State showed a single photograph (rather than an array) of Landano to Joseph Pascuitti, Chris Calabrese, and Anne Marie DeMichello, important witnesses to the state, and that they actually ruled Landano out as a suspect. *Ibid., p.16 to p.17.*

The document has a heading which reads "ID on Landano" followed by an entry of "Joe Pascuto-hair not right — suspect had curly hair." The next entry concerns two individuals, Liloia and Gourdine from BASF, followed by the notation "nothing." The third entry is "J&B - rest[aurant] girl & guy —younger looking." Next is a reference to "Calabrese Chris coffee truck -hair not right — more curley [sic]." The final reference reads "Jack Roth's statement page 3," with a large plus symbol marked between "page" and "3". This document is undated and unsigned. *T.III, 73-23 to 75-4.*

It will be observed that the document does not have the appearance of, nor has the Petitioner demonstrated, that this is an "official" police form similar in nature to a continuation report or a witness' statement. The document appears to be an ordinary piece of 8 1/2 x 14 lined paper from a legal pad which carries no pre-printed headings. When questioned as to why he prepared this particular document, Detective Thompson testified as follows:

DIRECT EXAMINATION

Q. I really don't know. Looks like I was just doodling at the time. Something was on my mind or I was thinking of something. *T.III, 75-9 to 11.*

Appendix A

CROSS EXAMINATION

Q. The document that you have in front of you, you explained it as being doodling as a result of something on your mind? A. Yes, sir.

Q. Can you be more specific as to what the was that prompted you to write that document? A. The only thing I can say is apparently, if it was during —I was during the investigation. We did talk to these people. Whether, what the date was I don't know. And during our interviewing them these were thoughts that came up or thoughts that were mentioned and I wrote them down on a scratch pad of some sort. *T.III, 80-10 to 22.*

This description of D-22 contrasts with that given for D-36, a handwritten statement of Christopher Calabrese, dated August 17, 1976, which Detective Thompson "recognized" as being the "form we used at the time to take statements from People." *T.III, 77-25 to 78-8.*

A

The Court will first consider the issue of whether the "Landano Document" demonstrates that the State engaged in impermissively suggestive identification techniques with these witnesses. The document itself is devoid of any information concerning how the listed witnesses were interviewed. While it stands to reason that these witnesses did in fact view a photo of Landano, there is no indication of whether this was the only photo used, as the Petitioner contends, or whether Landano's picture was part of a larger array.

To rebut the Petitioner assertion that a single photo was used, the State questioned Detective Thompson on the propriety of such a

practice, which he rejected out of hand as being bad police procedure which could have a highly negative impact upon an investigation. *T.III, 82-9 to 25.* Of more interest to the Court, however, are two documents which appear to relate directly to the "Landano Document," the first of which is a Kearny Police Department Continuation Report, introduced as State's Exhibit 8 ("Thompson Report"), which details Detective Thompson's activities for Thursday August 8, 1976.

CROSS EXAMINATION

Q. On August 26th in regard to the Snow homicide, the question, sir: What did you do on August 26, 1976 in regard to the Snow homocide? A. I would have to read off this report that I responded to Second Precinct with a set of mugshots relative to the murder of Officer Snow on 8/13/76. We again interviewed the following people trying to get an I.D. on a suspect. And they were: Rosemarie, a waitress at the B.& J. Restaurant.

Q. What result? A. Negative. Joseph Pascuto, Modern Warehouse, negative.

Q. Stop. Would you please give me the spelling of that — as soon as I find a pen.

THE COURT: [Thanks] for your cooperation.

MR. [N]EISSER: No Problem.

Q. Please. A. Joe P.A.S.C.U.T.O..

Q. P.A.S. A. P. as in Peter P.A.S.C.U.T.O..

Q. Place of employment? A. Modern Warehouse.

Q. Results? A. Negative.

Q. Who else did you talk to? A. Emil Lilioa. B.A.S.F., negative results.

Q. Who else? A. Jamon Gourdine. B.A.S.F., negative results. Jack Roth, 40 Jacobus Avenue, tentative. Jonathan Roth, 40 Jacobus Avenue, positive. *T.III, 84-8 to 85-17.*

This "Thompson Report" appears to be closely tied to the "Landano Document" for the following reasons. First, of the witnesses listed in the "Landano Document," two, Emile Liloia and James Gourdine, are mentioned in only six other documents that were put before the court; S-8, the "Thompson Report;" D-37, the "Hart Report;" two continuation reports of Detective Rose, dated 8/14/76 and 8/16/76, marked S-5[19] and; two Federal Bureau of Investigation documents dated 8/18/76, marked D-30[20] Of these, only the "Thompson Report" and the "Hart Report," both dated

---

19. Rose report of 8/14/76:

2- "Emil" Liloia - of Bandish Co. - operating Engineer - who claimed to have seen the men walking the raod [sic] but could not give description of the men. I asked him to reinterview on Monday. 3- James Gourdine - Foreman at the Bandish Co. who gave short interview and stated he had only seen the man for a few seconds. I then requested that we will get back to him for statement.

Rose report of 8/16/76, page 6, merely listed persons interviewed in the preceding few days, including "Emil" Liloia and "Jamon" Gourdine.

20. James Gourdine and Emile Liloia, both of BASF, reported seeing two white men; see D-30, pages marked 7 and 8, respectively.

8/26/76, were compiled after James Landano had been tentatively identified as a suspect, that having occurred on August 25, 1976. As there is no documentation that either Liloia or Gourdine were interviewed after August 26, and as both documents seem to reflect the same witness information, it appears, and the Court finds, that the "Landano Document" and the "Thompson Report" were prepared contemporaneously.[21]

Second, we have the testimony of the document's author, Detective Thompson, who testified that the "Landano Document" would have been created at the same time as his official report.

DIRECT EXAMINATION

Q. It is undated? A. It is not dated. No, sir.

Q. Are those the type of notes that you can subsequently utilize for purposes of writing a full and comprehensive report concerning what you had done on any given day? A. Yes, on a given day that I, that I did it. I couldn't do it — In other words, I feel I must have done it on the day I was doing my report on these things.
T.III 80-23 to 81-7.[22]

---

21. Two of the witnesses mentioned in the "Landano Document," Christopher Calabrese and the "Restaurant Guy," are not mentioned in either the Thompson or Hart Report, S-8 and D-37.

22. Additionally, in *Defendant-Petitioner's Proposed Findings of Fact and Conclusions of Law*, the Defendant concedes, at 39-15 to 40-20, that the "Landano Document" refers to August 26, 1976, and that it is related to D-37 (which by inference would include S-8).

Appendix A

The final connection between the "Landano Document" and the "Thompson Report" is D-37, which has already been referred to as the "Hart Report" and is the second document which relates to D-22. D-37 is another Kearny Continuation Report dated Thursday, August 26, 1976, but is authored by Lieutenant Hart. This report appears to reflect all of the information contained in the "Thompson Report," which, according to DetectiveThompson, formed the basis of Hart's entries. See *T.III, 90-24 to 91-4*

The "Hart Report" reads, in part, as follows:

> Assigned Dets. Thompson and Hanson to go to the second precinct and to show a lay out of photos which included a picture of our new suspect.[23] Detectives Thompson and Hanson showed the following people this lay out of photos:
> "Rosemarie" - Waitress of the B&J Restaurant
> Joseph Pascuto
> Emil Lilioa
> Jamon Gourdine
> Results of this photo lay out proved negative with the above people.

The report also reflects that Jack Roth made a tentative I.D. of Landano, while his son, Jonathan Roth, was more positive. Colin E. McCormick also made a tentative I.D. of the new suspect.

What both the "Thompson Report" and the "Hart Report"

---

23. The new suspect on August 26 was Vincent James Landano. See *T.III, 92-2 to 8.*

demonstrate is that on the first possible date any of the witnesses listed in the "Landano Document" could have been confronted with a photo of Landano, that photo was "included" in a lay out of mugshots.

At this hearing, the burden of demonstrating that the State engaged in impermissibly suggestive identification techniques rested squarely with the Petitioner. The "evidence" presented by the Petitioner on this point consisted solely of their interpretation of the "Landano Document." This is insufficient. The documentary evidence presented indicates that these witnesses were shown Petitioner's photo within an array of mug shots. D-37 includes an entry indicating that the entire lay out was shown to Jack Roth who believed the photo "might be the person if he had a Fu Manchu mustache [b]ut at this time he was not sure." The clear implication of this statement is that it was spontaneously volunteered by Roth. No proofs have been presented to the Court that would lead it to believe that the information contained in Detective Thompson's "doodlings" were not similarly spontaneous.

At the evidentiary hearing, Joseph Pascuiti testified that on the occasions when he was shown photos, he was always shown "stacks," never a single picture. *T.IV, 15-13 to 16-9*. Christopher Calabrese, a coffee truck operator who selected Victor Forni's photo in August 1976, and Petitioner's photo during a display in February 1977, testified at the hearing that at no point was he ever shown a single photo nor was he ever coached on selecting a particular photograph. *T.IV, 38-20 to 39-23*. As such, this Court is compelled to find as a fact that the "Landano Document" does not support the allegation that the State engaged in an impermissibly suggestive identification process by either using a single photo of the Petitioner or by somehow drawing the witnesses' attention to the same.

Appendix A

B

Having determined that the witnesses listed in the "Landano Document" were not subjected to an improper photo display, this court must, as with the "Pasapas Report," consider whether this document, D-22, was suppressed, and if so, whether post conviction relief is warranted.

The initial question is a simple one. The only testimony received concerning the "Landano Document" and whether it was ever turned over during pre-trial discovery was given by Ms. Smith on Redirect, who stated that prior to gaining access to the files of the Kearny Police Department (where D-22 was found) and the other State agencies involved, she had never come across this document. *T.I, 128-2 to 11.* As there is no documentation to rebut Ms. Smith's testimony, this Court will once again, for purposes of argument, draw the strongest inference in favor of Petitioner and assume (arguendo) that this document, D-22, was not turned over but was suppressed by the State. As with the "Pasapas Report," discussed supra, the question thus becomes whether the State's failure to disclose this document warrants post conviction relief.

The withholding of material evidence by the prosecution which is exculpatory or favorable to a defendant is a denial of due process and the right to a fair trail. *Brady v. Maryland, supra*, 373 *U.S.* at 87, 83 *S.Ct.* at 1196; *State v. Carter, supra*, 69 *N.J.* at 432. A prosecutor is presumed to have knowledge of all the evidence present in their files, and such knowledge is imputed to the prosecutor where actual knowledge is lacking. *United States v. Agurs, supra*, 427 *U.S.* 97, 96 *S.Ct.* 2392. Additionally, a prosecutor's file is considered to be co-extensive with police files and knowledge of those files contents is similarly imputed to the prosecutor. *State v. Carter, supra*, 91 *N.J.* at 429; see also *Giglio v. United States, supra.*

This document is also arguably exculpatory. Without overstating the obvious, we have a document in which Joseph Pascuiti, a key witness at trial, reportedly indicated to Detective Thompson that in the photograph of the Petitioner shown to him on 8/26/76, Pascuiti felt that the "hair was not right - suspect had curley [sic] hair." This same position was apparently taken by Chris Calabrese. Additionally, Anne Marie DeMichello apparently felt that the individual she saw was younger than the Petitioner appeared in the photo used on that date.[24]

As with the "Pasapas Report," discussed supra, the Court must determine whether this evidence is in fact material, and shall again apply the third standard of materiality as originally formulated in *United States v. Agurs, supra*, and apparently retained by our State Supreme Court in *State v. Marshal*. Where either no request or only a general request for discovery has been made, the omitted evidence will be found to be material if, when viewed in the context of the entire record, it establishes a reasonable doubt that was not otherwise present. *State v. Engel, supra*, 249 *N.J.Super.* at 392; *United States v. Agurs, supra*, 427 *U.S.* at 112, 96 *S.Ct.* at 2404.

During the evidentiary hearing, counsel for the Petitioner focused upon differences between the "Landano Document" and both the "Thompson" and "Hart Reports."[25] The testimony on this issue was developed as follows:

---

24. From the documents provided, it appears that only two individuals from the B&J Restaurant were ever interviewed; Anne Marie DeMichello, the waitress, and Danny Roche, owner. Mr. Roach reported seeing the bearded man on both the 12th and 13th of August, but not a dark haired man. Ms. DeMichello reported seeing both. Based upon the record put before it, the Court finds as a fact that the reference to the J&B Restaurant "Girl and Guy" refers only to the impressions of Ms. DeMichello.

25. There is no indication that either the Thompson or Hart Reports, S-8 & D-37, respectively were not turned over to Landano's trial attorney, James Flynn.

Appendix A

REDIRECT EXAMINATION OF THOMPSON

Q. Sir, let me put in front of you S-8. We can agree, can't we, that S-8 which is a police report that you signed *off* on August 26, 1976 has some names that appear on Defendant's Exhibit 22, right? A. Yes, sir.

Q. Okay. But next to Rosemarie (sic), referring to S-8, it says negative, right? A. Correct.

Q. Whereas next to Rose — next to J&B Restaurant girl and guy it says: Younger looking. Does it not, sir? A. Yes, sir.

Q. Next to Joe Pascuto it says negative on S-8, does it not? A. Yes, sir.

Q. But next to Joe Pascuto on Defendant 22 it says : Hair not right. Suspect had curly hair. Right? A. Yes, sir.

Q. That is true. That phrase does not appear on S-8; isn't that true, sir? A. Yes.

Q. Okay. Chris Calabrese, whose name appears on Defendant's Exhibit 22, his name doesn't appear at all on S-8. Can't we agree on that? A. Yes, sir.

Q. Okay. Let me show you another report that seems to refer to the August 26th identification.

- THE COURT: What is that?

MR. MULLIN: Defendant's Exhibit 37. (Police report dated August 26, 1976 was marked Defendant's Exhibit 37 for Identification.)

Appendix A

Q. Thursday, August 26, a report that appears to be signed by Lieutenant Hart, two pages. Let mow [sic] show you Defendant's Exhibit 37. Take a moment and look at this because you haven't seen it and then let me ask a question or two about it. Let me know when you are ready.
Does that document, Defendant's Exhibit 37, also refer to some efforts you made with Detective Hanson on August 26, 1976 to visit various witnesses, sir? A. Yes, sir, it does.

Q. And indeed that has the name — Strike that. Indeed, Defendant's Exhibit 37 has several of the names that appear on Defendant's Exhibit 22; does it not? A. Yes, sir, it does.

Q. Okay. It has entry: Rosemarie, waitress at the B. & J. Restaurant, does it not, referring to Defendant's Exhibit 37. A. Yes, sir.

Q. Next to the entry it is blank; is it not. A. Yes.

Q. There is no reference to any statement by Ann Marie DeMichelle that she thought the suspect was younger than Landano. A. Yes.

Q. Okay. Next to Joseph Pascuto on Defendant's 37 there is also a blank; is that not correct sir? A. Yes, sir.

Q. There is no entry next to Joseph Pascuto saying: Hair not right, suspect had curly hair. Isn't that so? A. Yes, sir.

Q. Okay. And there is no entry at all next to — Strike that. There is no entry at all for Chris Calabrese; isn't that right? A. Yes, sir.

Q. We can agree nowhere on Defendant's 37 is there any reference to Chris Calabrese saying: Hair not right, more curly. Isn't that right, sir? A. Yes. *T.III, 87-17 to 90-23.*

RECROSS EXAMINATION OF THOMPSON

Q. And is it not also a fact that after the name Jamon Gourdine [sic] is the following: Results of this photo layout proved negative with the above people. A. Yes.
T.III, 91-22 to 92-1.

The Petitioner also brought out, during the direct examination of Ms. Smith, that there were no statements or reports found during their review of the State files which reflected, verbatim, the information contained in the "Landano Document." *T.I, 47-19 to 49-14.*

The court will first consider what impact the "Landano Document" may have had upon the trial testimony of Joseph Pascuiti. The following excerpts are from Joseph Pascuiti's testimony given on April 28, 1977, which was marked S-14 at the evidentiary hearing:

DIRECT EXAMINATION OF PASCUITI/TRIAL

Q. Now, what did that man look like? A. He was white, dark hair, built up in the shoulders and he wore like a little colored jacket. *Trial Trans. 8.89-14 to 16.*

Q. Now, the man that you saw, was that the driver? A. Yes, it was.

Q. What type of view did you get of the driver at that particular

time? A. A side profile.

Q. And do you know whether or not the driver — strike that. What facial characteristics, if any, do you remember of the driver at that point? A. None.

Q. Did you determine in your own mind whether or not you thought the driver was the same man you had seen next to the police officer? A. Yes.

Q. And were you able to determine the color of hair of the driver? A. Black.

Q. And how long would you estimate that the car was in front of your location as he sped by? A. Four or five seconds. *Trial Trans. 8.94-4 to 19.*

Q. Could you tell us whether or not the man, the dark haired man that you say was broad shouldered, could you tell from you vantage point on either occasion of seeing him by the police car or as he went by you, whether or not he had a mustache? A. I did not see a mustache. I couldn't tell.

Q. Did you get, at any point that day, a full face view of that man? A. No, I didn't. *Trial Trans. 8.96-3 to 10*

CROSS EXAMINATION OF PASCUITI/TRIAL

Q. And that man, to the best of your recollection, from what you saw had no mustache, is that correct? A. Yes.

Q. He was attired in a shirt? A. A short sleeve shirt.

Q. Of light color? A. Yes.

Q. And you said "yellow", I think? A. Yes.

Q. He did not have an outer jacket of any type on, did ne? A. No. I do not know.

Q. When you saw him you saw him also from the back, didn't you. A. Yes.

Q. And you could see the yellow of his shirt? A. Yes. I could see the light color shirt that he had on.

Q You said it was short sleeves? A. Yes.

Q. And you could see it was short sleeves? A. Yes.

Q. Did he have anything on his head? A. No, he didn't.

Q. In fact, you observed his hair, did you not? A . Yes, I could.

Q. And, I believe, you told us it was black? A. Yes.

Q. Possibly a little lighter than black? A. It was dark. No. It was black.

Q. I mean, do you recall ever telling the police that it was little lighter than black? A. Dark color.

Q. In any event, it was dark colored hair? A. Yes.

Q. In fact, you described it, didn't you, as being a full head of curly hair? A. He had curls. It wasn't full. It was curly hair.

Q. You say it wasn't full. What do you mean? A. Full, like out.

Q. It wasn't an Afro? A. No. It was close to the head itself.

Q. You did describe it as curly? A. Yes.

Q. Would you tell us what you mean by that? A. Curly, like small curls and just —

Q. If I may be so bold, would it resemble the Prosecutor's hair? A. No.

Q. It wasn't quite that curly? A. No.

Q. But, it was not straight hair? A. No, It wasn't.

Q. And was it closely cropped, closely cut? A. Yes.

Q. Would it be fair to say it was short? A. Yes.

Q. Now, that man who went to the police car with the gun, you're fairly certain was the man who drove the car as it sped away? A. Yes, it was.

Q. Because you got enough of a view of the man as he drove away that in your mind it compared with the man who was at the police car, is that right? A. Yes. It was the same person.

MR. FLYNN: May I see S-39?[26]

---

26. S-39 is an envelope containing 17 photographs, submitted at the evidentiary hearing as S-15.

Q. Co you remember a time in August, a few days after this incident, the Kearny Police showing you some photographs? A. Yes.

Q. And specifically referring to S-39B for identification, do you recall telling them that the man looked like that man?[27] A. Yes, I did.

Q. Did you mean when you told them that, but without a beard? A. Without a beard.

Q. As far as you thought facially also without a mustache, I assume? A. Yes.

Q. But, facially and from the way his hair was you thought that it looked like the man? A. [sic] Is that right? A. Yes.

Q. Now, do you recall being shown the photographs again in January of this year? A. I saw so many times.

Q. Let me ask you this: When do you think was the last time you looked at photographs? A. It was recently.

Q. Other than in the Prosecutor's Office, would it be this year? A Yes.

Q. And I show you a whole group of photographs. Can you recognize if this group of seventeen were shown to you? A. Yes.

Q. And at that time this year when the detective showed you that group of photographs, did you, in fact, select and say you

---

27. S-39B is a photograph of Bruce Reen.

thought it looked like this man in S-39C?[28] A. Yes, I did.

Q. And let me ask you, looking at that photograph, S-39C, what in that photograph resembles the man you saw going with the gun towards the police car? A. His hair.

Q. So when you said "curly", it's similar to the way the hair is in that photograph? A. Yes.

Q. Anything else about his face? A. Profile.

Q. And how about his shoulders? A. No.

Q. You don't think his shoulders —

MR. MULCAHY: I'm sorry. What's the answer?

MR. FLYNN: His answer was "No".

Q. You don't think his shoulders were as large? A. He was built up more.

Q. The man you saw? A. Yes. He had more of a bigger shoulders.

Q. But, of the seventeen pictures shown to you, and the ones I displayed, it was that picture with the man with the curly hair that you picked out as most resembling the man who ran to the police car with the gun, is that right? A. Yes, sir.

MR. FLYNN: That's all I have.

---

28. S-39C is a photograph of Victor Forni.

Appendix A

REDIRECT EXAMINATION OF PASCUITI

Q. Mr. Pascuiti, you did not select any photographs from the display you saw, you were not certain of anyone, is that right? A. Right.

Q. Are you certain whether or not there was a mustache? A. No, I'm not.

Q. You're certain though that the man who was by the police officer didn't have a beard, aren't you? A. Yes, I am.

Q. And you're certain he had broad shoulders? A. Yes.

Q. And you're certain about the dark hair? A. Yes. *Trial Trans. 8.98-20 to 8.103-21.*

In Petitioner's Brief of April 29, 1992, at page 17, their view of the importance of this document as to Joseph Pascuiti was set out as follows:

> At trial, Pascuitti [sic] admitted that the killer had curly hair, but, as a State's witness, Pascuitti [sic] never ruled Landano out as a suspect. Rather Pascuitti [sic] *included* Landano as a suspect by describing the killer as having dark hair.

This same position is repeated in the *Defendant-Petitioners' Proposed Findings of Fact,* at 39-16.

As mentioned previously, the information contained in the "Landano Document" concerning Joseph Pascuiti reads "Joe

Pascuto — hair not right -suspect had curley [sic] hair." There are two aspects to this statement. The first aspect is one of "face value;" that in the particular photo of Petitioner shown to Pascuiti, he felt that the hair wasn't curly enough. Looking to the trial testimony of Joseph Pascuiti, quoted at length above, it can be seen that Pascuiti's belief that the actor had curly hair was effectively explored by trial counsel on cross-examination. As such, the possible effect of having this document, as it relates to this aspect, would be cumulative only.

The second and more important aspect, and the one on which Petitioner has based his argument, is that in rejecting this particular photo, Pascuiti was in fact rejecting Petitioner as a suspect. Two factors, however, weigh against this view. First, Pascuiti was never presented as a witness who could give a rock-solid identification of the shooter/driver. Having been some 50 yards distant from the where the shooting took place, Pascuiti was incapable of offering more than a chronology of events and giving a general physical description of the man he saw shoot and then drive off. The evidence indicates that early in the investigation, on August 19, 1976, Pascuiti had selected a photo of Bruce Reen as looking like the shooter/driver, though he was "not positive." *See Trial Transcript, 8.101-6 to 18; See also D-25/S-5, Continuation Report dated 8/19/76.* On August 23, 1976, Pascuiti "stopped on two pictures, one was Forni but he replied he could not positively I.D. either of them." *See S-5, Continuation RePort dated 8/23/76.* On August 23, 1976, Pascuiti "stopped on two pictures, one was Forni but he replied he could not positively I.D. either of them." *See S-5, Continuation Report dated 8/23/76.* On August 31, 1976, Pascuiti failed to make an identification. *See S-5, Continuation Report dated 8/31/76.* As has already been determined by this Court, on January 19, 1977, Pascuiti picked a photo of Victor Forni as "resembling" the driver. His trial testimony concerning his selection of Forni was similarly equivocal. Petitioner's trial counsel brought out the fact that

Pascuiti thought the hair and "profile" "resembled" the actor, but that the actor had larger shoulders. *S-14; Trail Trans. 8.102-9 to 25.*[29]

The second, though less persuasive factor, is that Pascuiti was not in fact ruling Petitioner out but was at most ruling out the particular picture used on that date. This Court notes that Jacob Roth gave only a tentative identification of Petitioner on this date, commenting that it "might be the person if he had a Fu Manchu mustache." See D-37. This initial photo had Petitioner wearing a mustache. On 8/31/76, Roth positively identified Petitioner from a more "recent photo" which portrayed Petitioner without his mustache. See D-12. As such, Pascuiti's reaction can be seen as having been to a particular photo, rather than to a particular person.

In addition to the foregoing, the Court notes that Pascuiti was given an opportunity at trial, in the presence of the jury, to view the photo array marked S-39 (S-15 here), and that he failed to select Petitioner's photo, and that he also failed to give any form of in-court identification of Petitioner as the perpetrator.

In sum, Pascuiti was a witness who was never able to positively identify the shooter/driver, either before or during the trial. At trial, the jury knew that Pascuiti had on at least two occasions selected others from an array in which, as of August 26, Petitioner's photo could be found. In hearing Pascuiti testify that Forni's hair and profile resembled the actor, the jury was effectively presented with all the information contained in the "Landano Document" concerning Joseph Pascuiti ; i . e ., that Pascuiti did not believe that

---

29. As noted previously, trial counsel specifically asked Pascuiti about having viewed the array in January of 1977, to which Pascuiti indicated that, while uncertain as to the exact month, it had been at some point since the new year began. *Trial Transcript, 8.101-19 to 8.102-8.* The Court also points out that the photo referred to is full face, not profile.

the photo of Landano accurately depicted the shooter.

The information attributed to Christopher Calabrese in the "Landano Document" is identical to that attributed to Joseph Pascuiti; "hair not right - more curley [sic]." The role of these two witnesses, however, was quite different. While Mr. Pascuiti saw the actual crime unfolding, Mr. Calabrese supposedly served the dark haired perpetrator coffee earlier that morning. As such, Mr. Pascuiti was a key State's witness at trial whereas Mr. Calabrese was not called to testify.

During these hearings, several documents mentioning Mr. Calabrese were placed into evidence. D-36 and D-42, a signed statement and a Kearny Police report, respectively, both dated 8/17/76, indicate that Mr. Calabrese was shown an F.B.I. flyer of a white male (Terrance Karl Alden), and that he identified the same as having been at his truck on the morning of 8/13/76. D-43 is a Kearny Continuation Report dated 8/24/76, in which Mr. Calabrese is reported to have selected a photo of Victor Forni from an array as being "the person that he had seen but would look more like the person if he had a mustache and was a little heavier." D-20 is a signed statement dated February 10, 1977, in which Mr. Calabrese states that he selected a photo of Petitioner as "the closest to the guy I remember being at the truck but heavier." We also know, because of the "Landano Document," that on or about August 26, 1976, Mr. Calabrese was shown an array which included a photo of the "new suspect" (Petitioner), and that he rejected that photo.

Again, this Court is hard pressed to see how this information creates a reasonable doubt as to Petitioner's guilt. First of all, Mr. Calabrese did not testify at trial so it cannot be said that Petitioner was unable to effectively cross-examine a witness. Secondly, and more to the point, the information attributable to Mr. Calabrese in

the "Landano Document" does not alter the overall impact of his statements to the Police. It is argued by Petitioner that had trial counsel been in possession of this information, the jury could have been presented with a witness who "affirmatively ruled out Landano's photograph as depicting the killer," thus creating a "reasonable probability" of acquittal. This Court does not agree. Putting the information contained in the "Landano Document" in the light most favorable to the Petitioner, Mr. Calabrese can be seen, at worst, as being unsure in his identification. This does not create a reasonable doubt.[30]

Anne Marie DeMichello did testify at trial. The thrust of her testimony was that on the afternoon of August 12, 1976, Allen Roller and a dark haired, mustachioed man had been in the diner, and that the following morning, August 13, 1976, Roller bought two (2) containers of coffee to go. Ms. DeMichello testified that she was able to identify Roller because she thought he resembled "Jesus Christ" (Roller wore a beard), but that she was unable to remember the dark haired man. She was unsure whether she had ever seen the Petitioner before.

All the documentary evidence submitted at the hearing which mentions Ms. DeMichello echoes her trial testimony. The August 19, 1976 Continuation Report of Detective Rose reports that the "dark haired man whom she described as being shorter than the

---

30. It should be self evident that even if Mr. Calabrese had been called as a witness and affirmed that he had rejected Petitioner's photo on August 26, 1976, he would undoubtedly have also been asked whether, in January of 1977, he had selected a more recent photo of Petitioner as resembling the suspect. Just as Jack Roth made a positive identification based upon the more recent photo (without a mustache), Calabrese's identification combined with his consistent position that the suspect wore a mustache would, in this Court's opinion, have been more damaging to Petitioner's position than any possible doubts Petitioner may speculate would have been created in the juror's minds.

bearded man, black hair, cut short, mustache, age 25-30, neat looking, kind of stocky, big shoulders. . . ." See S-5. The August 23, 1976 Continuation Report of Detective Rose reflects that Rose "[s]poke to 'Ann Marie' waitress at B&J Restaurant, Old Lincoln Highway but she could not I.D. the suspect Forni as the one being in the Restaurant on Thursday, August 12, 1976." See S-5. D-17 and D-18, the Continuation Report of January 18, 1977 and a statement of January 24, 1977, respectively, both indicate that Ms. DeMichello picked Roller as resembling the bearded man she saw in the diner on the August 13, 1976. S-8 and D-37, respectively the "Thompson" and "Hart" reports, both indicate that on August 26, 1976, Ms. DeMichello and three others failed to make an identification from an array which for the first time included a photo of Petitioner.

As with Mr. Pascuiti, Ms. DeMichello was never presented as an identification witness as to Petitioner. She spoke only of Roller and an otherwise unidentifiable dark haired man with the mustache. At trial, in the presence of the jury, she stated that she was unsure of whether she had ever seen Petitioner before. In light of Ms. DeMichello's inability to positively identify the dark haired man, this Court finds that the information in D-22, the "Landano Document," that Ms. DeMichello thought the suspect "younger looking" than the particular photo of Petitioner shown to her on August 26, 1976, does not give rise to any doubt on the part of this Court as to the guilt of Petitioner.

This Court finds that the information contained in the handwritten notes of Detective Thompson which were compiled on or about August 26, 1976, when viewed against the overwhelming evidence of Landano's participation independent of and including the testimony of Joseph Pascuiti, Anne Marie DeMichello, and the information provided by Christopher Calabrese, falls far short of

the applicable standard by failing to create *any* reasonable doubt as to Petitioner's guilt.[31]

IV

In conclusion, this Court, for all of the forgoing reasons, denies the petition for post conviction relief filed by Defendant Landano herein.

As mandated by the Appellate Division, this Court did in fact conduct a full evidentiary hearing and allowed the parties great leeway in introducing evidence supportive of their respective positions. This was done in order to fully comply with the Appellate Division's directive that the hearing fully explore the two "new" issues as well as "any other claims or issues incidental thereto, including the impact, if any, of any lost or destroyed material." The Appellate Division also ordered this Court to determine, if the evidence concerning the "new" issues so warranted, whether any prior post conviction determinations, such as those concerning Roller, Portas and Roth may be seen in a new light.

This Court finds that the evidence adduced by Petitioner at these hearings does not impact in any way on the trial testimony of

---

31. Beyond this Court's determination that D-22 does not raise any reasonable doubt as to the Petitioner's guilt, this Court believes that a review of the related documents actually weakens Petitioner's position that it was Forni who was the shooter/driver. While Pascuiti testified that the dark haired suspect had no mustache, both Calabrese and DeMichello stated that he did. In fact, on the occasion when Mr. Calabrese selected Forni's photo, he stated that it could be the man if he was heavier and had a mustache. Forni never wore a mustache. While DeMichello never selected a photo for even a tentative identification, she had stated that the suspect had "big shoulders." This language is similar to that used by Pascuiti at trail, when, in being questioned by Petitioner's trial counsel about Forni's photo, Pascuiti stated that the dark haired suspect had "bigger shoulders." Petitioner was (at the time of trial) considerably larger in the shoulders than Forni.

either Roller, Portas or Roth, or on any other issue previously heard and decided by the various New Jersey Courts. Nor does the evidence impact upon any prior post conviction relief determinations concerning Roller, Portas or Roth, such that the evidence there would be seen in a different light.

Petitioner's witnesses, in the main, merely repeated what the various State Courts had previously heard and determined was insufficient to grant relief. The testimonial evidence failed to bring into question any of the prior court findings that have been rendered over the many years this controversy has survived.

The Assistant Prosecutor who tried the case, Mr. Mulcahy, was called by the Petitioner and testified about the original trial, general discovery practices in use at the time, and about his 1982 lecture to Professor Israel's Criminal Justice class at Kean College. Professor Israel, also called by Petitioner, testified about Mulcahy's lecture. Both of these individuals had previously testified before the late Judge Hanrahan. The Court also heard from Joseph Lotwis, Jr., of the New Jersey State Department of Banking, who testified about the relationship between Jacob Roth and Anthony Gallagher. See *T.III, 100 to 110.* This Court is persuaded, as Judge Hanrahan apparently was, that former Assistant Prosecutor Mulcahy was bragging to this class of students of his prowess as a prosecutor in the Landano case and was engaging in rhetorical excesses. Mr. Mulcahy was not fully apprised of who the woman taping his lecture was, nor of her purpose in doing so, whereas Professor Israel was.[32] The testimony at this most recent hearing added nothing new to the issue of Jacob Roth's identification of Petitioner.

---

32. The individual taping the lecture was the future wife of Vincent James Landano.

Appendix A

Similarly, the documentation introduced by Petitioner sheds no new light on any previously determined issue. Of particular importance, allegedly, to Petitioner at this hearing was a property and evidence report dated April 15, 1977, which was discovered by Petitioner during his attorneys' search of the State's files. See D-13. The report, which was stapled to a statement of Raymond Portas in which he identified Petitioner, lists (7) seven different groupings of photos including 2 pictures of Victor Forni. *T.I, 37-9 to 24, 128-19 to 22.* Petitioner argues that this report supports his position that Portas initially selected a photo of Forni, that that Picture was "spirited away," and that this selection was suppressed like the "Basapas" statement was. *Defendant-Petitioner's Proposed Findings of Fact and Conclusions of Law, pg. 29.*

This Court declines to reach similar conclusions or to attach sufficient importance to this document warranting the reconsideration of Judge Hanrahan's earlier decision on Portas' recantation. It is impossible to determine from the document itself whether the listed photos were being checked out of or into the evidence room, or to determine which pictures were in fact shown to Portas (although the logical inference is that item 5, the "8 photos spread of 8/31/76," was used as Portas' statement indicates he selected Petitioner's photo from an eight photo array). See *V.II, 101-22 to 103-8.* Additionally, this Court is also mindful that when presented with a photograph of Forni at a hearing before the Hon. H. Lee Sarokin, United States District Court, on September 2, 1987, Mr. Portas testified that he could not remember whether he had ever seen the individual before. See D-40, *Transcript of Proceeding,* 18-4 to 19-2. As such, Petitioner's contentions are not supported by any persuasive evidence.

In addition to all of the foregoing, as stated by this Court in previous opinions, the verdicts of the jury in this case were not

based solely on identification testimony. At trial, the State introduced pictures taken at a check cashing business in Staten Island, N.Y. Two of these photos, taken in July of 1976, depicted Landano with a mustache and wearing a denim hat similar to the one found in the automobile used during the commission of the crime. A third photo, taken at 12:50 P.M. on August 13, 1976, showed Landano without a hat. Hair samples from the hat found in the vehicle were similar to Landano's own. Diana Pesce, a girl friend of Landano's, was called as an alibi witness. She testified that on the date of the crime, Landano had been at a Methadone Clinic and that later in the day he purchased a hat similar to the one recovered from the auto. She also testified that Landano very rarely wore a hat and that he had shaved off his mustache because of a "cold blister" sometime after August 13, 1976. She had also heard "Jimmy speak of Forni."

Landano testified that he had bought a hat on August 13, 1976, and that at one time he had owned a hat similar to the one recovered. He testified that he had shaved off his mustache sometime after August 13, 1976, although he couldn't remember exactly when. At trial, the State also introduced a jacket recovered from the vehicle, which Landano denied owning or ever having worn. The hat and the jacket were placed on Mr. Landano, allowing the jury to observe their fit.

In short, the jury had many items of evidence, exclusive of purely identification evidence, to weigh in arriving at its verdicts.

For all of the foregoing reasons, this Court denies Petitioner's request for post conviction relief. A copy of this Court's order is attached hereto.

Appendix A

Very truly yours,

s/ Maurice A. Walsh, Jr.
Maurice A. Walsh, Jr., J.S.C.
Retired and T/A on Recall

MAW,Jr.:awm

N.B. It is also recommended to the parties herein, that questions of bail be addressed to the U.S. Third Circuit Court of Appeals (where Petitioner is presently under bail restraints) and/or the New Jersey Supreme Court, which is the highest State Court to have addressed this issue.

Appendix A

SUPERIOR COURT OF NEW JERSEY
HUDSON COUNTY – LAW DIVISION
(CRIMINAL)

STATE OF NEW JERSEY,

Plaintiff-Respondent

V.

VINCENT JAMES LANDANO

Defendant-Petitioner

ORDER

This matter having originally been opened to the Court by the filing by Defendant - Petitioner of a verified petition for post-conviction relief; and

The Plaintiff-Respondent having filed an answer to said petition; and

This Court having heard oral arguments concerning the merits of said petition for post-conviction relief; and

This Court, by letter opinion dated March 4, 1991, having denied the relief sought by Defendant - Petitioner in said petition; and

This matter having subsequently been reopened by the Court through the filing by Plaintiff - Respondent of a motion for a

rehearing; and

This Court, by letter opinion dated April 8, 1991, having denied the rehearing sought by Plaintiff - Respondent; and

This Court, having been directed by the Appellate Division, in a letter opinion dated March 12, 1992, to conduct full evidentiary hearings on the two "new issues" raised in Defendant - Petitioner's original petition for post-conviction relief; and

This Court, having conducted said evidentiary hearings on May 7, 8, 11 and 12, 1992; and

This Court, by letter opinion, dated July 17, 1992, having denied the relief sought by Defendant-Petitioner; and
FOR GOOD CAUSE SHOWN;

IT IS ON THIS 17TH DAY OF JULY, 1992 ORDERED:

That Defendant - Petitioner's petition for post-conviction relief BE AND IS HEREBY DENIED.

s/ Maurice A. Walsh, Jr.
Maurice A. Walsh, Jr., J.S.C.
Retired and T/A on Recall

MAW, Jr.:awm